93-860

No. 93-

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IN THE

Supreme Court of the United States

October Term, 1993

SHIRLEY IVY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DONALD IVY, DECEASED; CHARLES JARDON AND TONY K. JARDON, INDIVIDUALLY AND AS NEXT FRIEND OF CHARLES JARDON, JR.; ROBIN JARDON, WARREN JARDON AND SHARON JARDON; SHIRLEY ZALEWASKI, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF YEN ZALEWASKI, DECEASED; GARY THOMAS; MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BOBBY JOE INMAN, DECEASED; JAMES DONALD DELOATCH; JOYCE DELOATCH; URSULA MARGOT PARRY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES D. PARRY, SR., DECEASED; JAMES D. PARRY, JR.; JAMES CHRISTOPHER PARRY,

Petitioners,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMCAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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112 PP

QUESTIONS PRESENTED

This case was brought under Texas law and filed in a Texas state court by Texas plaintiffs against a Texas defendant and other defendants, and could not have been brought originally in federal court. It nonetheless was removed and transferred to a New York federal court for disposition. The judgment below presents the following questions:

1. Whether federal district judges may circumvent the limitations Congress wrote into its seven removal statutes, as the Second Circuit held below, simply by invoking the All Writs Act "to remove an otherwise unremovable state court case," in the discretion of the judge, "when the need arises."

2. Whether, as the Second Circuit held below, already injured named plaintiffs in Rule 23(b)(3) class actions are free, despite the Due Process Clause, to negotiate away the unaccrued future legal claims of absent persons without any notice, without any right to opt out, and without separate class representation, on the ground that such protections are not essential for "unknown plaintiffs," because "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good."

In addition to petitioners, the following persons appeared as plaintiffs-appellants in the Second Circuit below:

VERDA WILSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ISAIAH WILSON, JR., DECEASED;

EARL THOMPSON; JUDY L. THOMPSON;

PEGGY SANDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF MARTIN SANDS, DECEASED;

EMILE ANNIBOLLI;

LAURA JENKINS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF EDDIE JENKINS, DECEASED; RONALD L. HARTMAN, KATHERINA H. HARTMAN, AND AS NEXT FRIEND TO JEFFERY ALAN HARTMAN AND ANGELA MARIE HARTMAN, BOTH MINORS INDIVIDUALLY AND AS REPRESENTATIVE OF THOSE SIMILARLY SITUATED.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which affirmed both the district court's refusal to remand the case to state court and its dismissal of petitioners' claims, is reported at 996 F.2d 1425, and is reprinted as Appendix A, at **A1**. (Page references to the appendices bound with this Petition are styled "**A__**"). The decision and order of the United States District Court for the Eastern District of New York, 781 F. Supp. 902, and an unpublished ancillary order, from which appeal was taken are reprinted as Appendix B (**A26**) and Appendix C (**A60**), respectively.

JURISDICTION

The decision of the court of appeals issued on June 24, 1993. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 26, 1993. *See* Appendix D, at **A63**. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty or property, without due process of law."

28 U.S.C. § 1441 provides in relevant part:

> **§ 1441. Actions removable generally**
>
> (a) [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

The All Writs Act, codified at 28 U.S.C. § 1651(a), provides:

> **§ 1651. Writs**
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Fed. R. Civ. P. 23 is reprinted as Appendix E, at **A64**.

STATEMENT OF THE CASE

The decision below is the third in a line of cases from the Second Circuit beginning in 1988 that embraces a radical new removal doctrine — and the first squarely to present the issue to this Court. *See* note 32, *infra*. In conflict with decisions of this Court and several courts of appeals, this doctrine permits federal district judges to ignore Congress's seven precise removal provisions and to remove cases from state courts whenever they deem it necessary. In the words of the Second Circuit, the All Writs Act permits district judges "to remove an otherwise unremovable state court case" in the discretion of the judge, "when the need arises." **A8-A9**.

In this extraordinary case, a total of 21 States appeared as *amici curiae* to caution the Second Circuit that the failure to reverse the district court would invite "every federal district court to circumvent the removal statutes and other specific jurisdictional legislation and to transform the All Writs Act into a general grant of federal jurisdiction and a broad license to interfere with state court proceedings." Brief *Amici Curiae* of the State of Alabama, *et al.*, at 16. The 21 States termed this radical doctrine "a breach of the walls of comity and federalism that have been erected by Congress and the Supreme Court to ensure the continued vitality of our nation's parallel state and federal judicial systems," and "an ill-advised erosion of judicial federalism." *Id.* at 16-17.

Unfortunately, this concern for judicial federalism was not heeded. Instead, the Second Circuit reaffirmed its "All Writs removal" doctrine. **A8-A9**. This Court should grant certiorari to address what the 21 States correctly described as "an illegitimate judicial amendment of Congress's removal statute." *Id.* at 18.

Even if federal removal jurisdiction somehow exists in this case, there is a further question worthy of review by this Court: under Fed. R. Civ. P. 23 and due process, in what circumstances (if any) may *already* injured named plaintiffs, in a Rule 23(b)(3) class action for money damages, contract to extinguish the unaccrued *future* legal claims of absent persons? The binding effect of class actions on absent persons is an important issue, as illustrated by this Court's current consideration of the issue in the context of non-opt out, Rule 23(b)(2) class actions, in *Ticor Title v. Brown*, No. 92-1988. This petition presents fundamental aspects of the issue not present in *Ticor Title*, which are worthy of this Court's review regardless of the disposition of that case.

1. Proceedings in Texas.

As the 21 States noted, "[t]his case involves tort claims brought under Texas law in a Texas state court by Texas plaintiffs against a Texas defendant and other defendants." Brief *Amici Curiae* at 1. The case was filed in 1989 by petitioner Shirley Ivy and other plaintiffs in the District Court of Orange County, Texas.[1] Petitioners are Vietnam veterans and members of their families. They allege that they have suffered serious physical injuries as a result of wartime exposure to the chemical herbicide "Agent Orange."[2] As the court below acknowledged, "[t]here is no complete diversity of citizenship, and no federal issue is apparent in the complaints," **A7**, so that a state court was the only forum available to petitioners.[3] The case could not have been filed in federal court.

Nevertheless, respondents removed the case to the U.S. District Court for the Eastern District of Texas, citing two grounds for 28 U.S.C. § 1441 original jurisdiction removal, neither of which was

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[1] Petitioners brought suit on their own behalf, but also sought certification to proceed on behalf of a class of persons similarly situated. Original Petition at 16-18 (Joint Appendix ("JA"), 2d Cir. No. 92-7575, at 63-65). Although petitioners have vigorously represented the interests of the putative class since 1989, they do not assert that a class action is necessarily appropriate for other than limited pretrial purposes. The Texas courts took no action in this case prior to removal, so that all that is currently before this Court are petitioners' claims seeking recovery for their own injuries.

[2] Agent Orange was manufactured by respondents. The complaint alleges that Agent Orange "contained, as a byproduct of the manufacturing process, one of the most toxic chemicals known to man, a compound commonly referred to as TCDD or 'dioxin'" and that while in Vietnam petitioners "absorbed the deadly chemical through the air, through the skin and . . . through water and food." Original Petition at 8 (JA at 55). Petitioners seek damages for deaths and suffering from lymphomas, soft-tissue sarcomas, and other serious diseases that were caused by the veterans' exposure to Agent Orange in Vietnam; their family members seek damages for resulting wrongful death, loss of consortium, economic loss, and other harms. *Id.* at 12-13 (JA 59-60). The complaint arises under Texas statutes and common law, alleging defective design and manufacture, breach of express and/or implied warranties, strict products liability, negligence, failure to warn, breach of warranty, and deceptive trade practices. *Id.* at 8-15 (JA 55-62).

[3] The Second Circuit earlier held that federal law provides no legal remedy against respondents for injury as a result of the wartime use of Agent Orange. *In re "Agent Orange" Product Liability Litigation* (hereinafter "*Agent Orange*"), 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

ultimately accepted.[4] Both courts below upheld removal, however, on the theory that the All Writs Act permits district judges to remove otherwise non-removable cases whenever those judges deem it necessary to do so. **A8-A9**, **A54-A55**.

Simultaneously with filing their answer and notice of removal, respondents successfully urged the Judicial Panel on Multidistrict Litigation, over petitioners' objection, to transfer the case from Texas to the U.S. District Court for the Eastern District of New York. *See In re Ivy*, 901 F.2d 7 (2d Cir. 1990).

2. *Proceedings in the District Court.*

Once the case was in the Eastern District of New York, the earlier *Agent Orange* litigation became the focus of the district

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[4] As the district court below summarized: "[T]he defendants offered two grounds for federal subject matter jurisdiction. First, the court was said to have jurisdiction over this action 'because most of the plaintiffs' claims have already been asserted and adjudicated in federal court and plaintiffs' petition is merely an artful pleading to avoid federal jurisdiction.' Second, the court's jurisdiction was invoked 'pursuant to 28 U.S.C. § 1331 based on the doctrine of complete federal preemption.'" **A45** (quoting Notice of Removal). The district court accepted the "artful pleading" theory, *see Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), as a ground for removal. **A54**. The Second Circuit reversed, however, holding that the district court's "artful pleading" analysis misread applicable precedent. **A8**. Respondents abandoned their "complete preemption" theory.

Respondents belatedly moved in the district court "to amend their notice of removal to assert removal pursuant to 28 U.S.C. § 1442(a)(1)," on the peculiar theory that when they designed and marketed herbicides containing a deadly poison (which the government ultimately bought for use in Vietnam), they were somehow "persons" acting under a "federal officer" within the meaning of that provision. **A6**. Although neither the district court nor the Second Circuit addressed the theory in this case, **A9-A10**, the issue was resolved against respondents in a companion case involving civilians exposed to Agent Orange. *See Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). The court ruled that respondents' challenged actions were not taken pursuant to federal direction, because respondents were "being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants." *Id.* at 950. It also noted that "[t]he government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries." *Id.*

Thus, the sole removal issue before this Court concerns the propriety of removal under the All Writs Act.

court's decision both to uphold removal and to dismiss all of petitioners' claims.

A. The Earlier *Agent Orange* Litigation

Beginning in 1978, thousands of Vietnam war veterans and their families brought state-law tort actions against the present respondents seeking monetary relief as a result of illnesses and other injuries they believed they were suffering as a result of exposure to Agent Orange. **A3**. These lawsuits were consolidated in the U.S. District Court for the Eastern District of New York into a single action known as *In re "Agent Orange" Product Liability Litigation*, MDL No. 381. **A3**. The final complaint alleged that all the named plaintiffs had been exposed to Agent Orange and "were thereby caused to suffer severe and permanent disabling injuries, diseases, physical disorders and disfigurement, and in some cases, death." Supplemental Appendix, 2d Cir. No. 92-7537, 860, 878. None claimed to be uninjured or to have unaccrued future claims.

On December 16, 1983, the district court certified a Rule 23(b)(3) class with opt-out rights in order to address the common issues of general causation and the military contractor defense, and set trial for six months later, on May 7, 1984. **A3-A4**.

As required by Rule 23(c)(2), the district court directed "to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Over respondents' objection, the class was defined to consist of all veterans and their families who had a "subjective" basis for claiming that Agent Orange had harmed them. *Agent Orange*, 100 F.R.D. 718, 728-29 (E.D.N.Y. 1983).[5] Consequently, individual, first-class mail notice was

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[5] The district court held: "The defendants' contention that the class as the court has defined it is unworkable because it is subjective ('all veterans who were injured . . . by exposure to Agent Orange') is a *non sequitur*. Subjectiveness does not affect the applicability of the class trial's findings to members of the class and it does not prejudice the defendants in any way. The class is, therefore, adequately defined and clearly ascertainable." *Agent Orange*, 100 F.R.D. at 728-29 (citation omitted). The Second Circuit denied respondents' mandamus petition to reverse certification of the class as so defined. *In re Diamond Shamrock Chemical Co.*, 725 F.2d 858, 860 (2d Cir. 1984).

On final merits review at the conclusion of the case, the Second Circuit reiterated that this class definition had been proper and that adequate notice had been given to those who subjectively believed that they had been injured by

directed to all persons with a lawsuit pending in federal court, or who had filed a complaint form with the Veteran's Administration's Agent Orange Registry. *Agent Orange*, 100 F.R.D. at 729.[6] The court also mandated notices in major newspapers and veterans' publications alerting veterans that "[i]f you or anyone in your family can claim injury, illness, death, or birth defect as a result of exposure to 'Agent Orange' . . . you are a member of a class in an action brought on your behalf in the United States District Court for the Eastern District Court of New York, unless you take steps to exclude yourself." *Id.* at 734. Limited radio and television notices were also required. *Id.*

The deadline for opting out of the Rule 23(b)(3) class was May 1, 1984. Six days later, on May 7, 1984, the named plaintiffs decided to settle the case rather than commence the trial as scheduled. They received what the Second Circuit characterized as "essentially a settlement at nuisance value," *Agent Orange*, 818 F.2d at 171, in exchange for agreeing that all class members would be forever barred from suing the defendants for injuries from Agent Orange.[7] However, as the courts below ruled, the parties agreed to bind not just the persons identified in the class notice (who subjectively believed that they had suffered injuries and that they

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Agent Orange: "Anyone who believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel." *Agent Orange*, 818 F.2d 145, 169 (2d Cir. 1987).

[6] The Veteran's Administration had established the Registry in 1978 to help "identify all Vietnam veterans expressing a concern about the possible adverse health effects of their exposure to Agent Orange." *Agent Orange*, 597 F. Supp. 740, 852 (E.D.N.Y. 1984). Notice was also directed to veterans who had expressed concerns about injury to state authorities. The Governor of each State was requested to refer the class notice "to any state organization created by the executive or legislative branches dealing with the problems of Vietnam veterans. 100 F.R.D. at 730-31.

[7] The Settlement created a fund to benefit class members and their families which, as administered, eventually allotted an average of $3200 for death and total disability claims, and nothing for other claims. *See* **A39**. In exchange, the named plaintiffs agreed that respondents would not be "subject to liability or expense of any kind to any member of the Class" with respect to Agent Orange and that "[c]laims against the Fund shall be the exclusive remedy . . . and all members of the Class are forever barred from instituting or maintaining any action against any of the defendants." *Agent Orange*, 597 F. Supp. at 864 (Settlement Agreement ¶ 5).

currently had a claim). Rather, in the settlement the parties expanded the class definition, stating: "The Class specifically includes persons who have not yet manifested injury." *Agent Orange*, 597 F. Supp. at 865 (Settlement Agreement ¶ 8).[8]

The district court approved the settlement despite its modest size, largely on the conclusion that the scientific evidence that existed on dioxin made it "highly unlikely" that any plaintiff whose claims were then pending in the courts could establish causation. *Agent Orange*, 597 F. Supp. at 749.[9] The court of appeals affirmed. *Agent Orange*, 818 F.2d 145 (2d Cir. 1987).

B. The District Court's Removal and Dismissal of the Case

Both the district court's decision to permit removal and its decision to dismiss petitioners' case flowed from its view that the instant action was "a direct challenge to the validity of the settlement" that the named plaintiffs had negotiated with defendants, and which the court approved. **A42**.

Thus, the district court ruled that "removal was proper because the court . . . must enforce its bar on subsequent suits by class members against the defendants." **A48**. The district court relied on a removal doctrine articulated by two earlier Second Circuit decisions (see pp. 23-24, *infra*), holding that the All Writs Act, 28 U.S.C. § 1651(a), "permits a federal court to remove state court actions to federal court [even] in situations where specific statutory removal authority is absent." **A55**. Resort to the All Writs removal doctrine was necessary, the court indicated, "[b]ecause by bringing new suits in state court, the plaintiffs challenge the binding effect of the Settlement Agreement." **A55**. Thus, it concluded, "[t]he removal of these actions to this court is a mechanism for protecting this court's judgment and order." **A55**.

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[8] By accepting this finding of the lower courts for purposes of review in this Court, petitioners do not waive their contract law objections to the lower courts' ruling that this sentence was intended to bind *absent* future claimants.

[9] The district court noted that although "[i]t is, of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be revealed . . . it appears unlikely that such proof will develop in time to affect this litigation." 597 F. Supp. at 795. *See also Agent Orange*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) (granting summary judgment against opt-out plaintiffs based on insufficiency of scientific proof).

The district court granted the motion to dismiss, finding that "[t]he terms of the Settlement Agreement . . . bar plaintiffs from proceeding with this action." **A55**. Petitioners argued that as of the opt-out deadline they had been unaware of any injuries from Agent Orange, and thus the named plaintiffs had no authority to bind them.[10] Under the 1984 class definition and class notice, of course, *only* veterans and their families who had a subjective basis for believing, as of May 1, 1984, that they were suffering injuries from Agent Orange exposure were in the class and were required to opt out to preserve their rights to future suit. See pp. 5-6 & note 5, *supra*.

The district court held that this point was "irrelevant" and that the parties to the settlement had legitimately decided (with its approval) *after* the Rule 23(b)(3) opt-out right had passed to expand the class and extinguish the unaccrued future claims of "'persons who have not yet manifested injury.'" **A55** (quoting settlement). Extinguishing such claims, the district court explained, advances "the interests of presently injured plaintiffs as well as defendants in achieving a settlement," by setting "definitive limits on defendants' liability." **A58**.

3. Proceedings in the Second Circuit

On appeal, the Second Circuit rejected both petitioners' objection to removal and their due process and other defenses to reading the 1984 settlement as extinguishing their claims.

The court found no basis for removing the case in the removal statute enacted by Congress. Instead, the Second Circuit reiterated

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[10] The uncontradicted record shows that the first symptoms of petitioners' injuries manifested themselves only *after* the opt-out deadline. The complaint specifically recites that "[t]he deaths occurred and the diseases and injuries were manifested only *after* May 7, 1984, when other veterans' actions against these Defendants were settled." Original Petition at 12 (JA 59) (emphasis in original). There is no evidence in the record that any of petitioners "believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam" (see note 5, *supra*) or had any basis at that point for believing that he or she "can claim injury, illness, disease death or birth defect" and thus should "take steps to exclude yourself" from the class (see p. 6, *supra*). Indeed, there is no evidence that any petitioners knew that they had been exposed to Agent Orange, or that they had even heard of the *Agent Orange* litigation. *See, e.g.*, **A68-A69** (affidavit of Shirley Ivy).

its view that "a district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case." **A8**. The "exceptional circumstances" in this case involved an undefined "deleterious effect" of allowing "Agent Orange victims . . . to maintain separate actions in state court." **A8**. The court was concerned that such suits raised the prospect that a state court would have to "decid[e] the scope of the *Agent Orange I* class action and settlement," so that the task would not fall to "[t]he court best situated to make this determination" — namely, "the court that approved the settlement." **A8-A9**. Removal jurisdiction was supposedly necessary to help the district court "guard[] the integrity of its rulings in complex multidistrict litigation." **A9**. The Second Circuit did not explain why an ordinary state court judge could not be trusted to correctly decide the meaning of the settlement negotiated by the parties, and the extent to which Rule 23 and due process might limit its binding effect.

Thus, for the third time (see pp. 23-24, *infra*), the Second Circuit employed the All Writs Act to allow district judges to fashion their own removal jurisdiction "'when the need arises.'" **A9** (citation omitted). Further, it made clear that whether or not "exceptional circumstances" exist to create such jurisdiction is a matter left to the "proper exercise of judicial discretion." **A9** (citation omitted).[11]

After upholding removal, the Second Circuit rejected petitioners' claim that to permit the parties to the 1984 settlement to extinguish petitioners' unaccrued future claims, without notice and opt-out rights, violated Rule 23 and due process. The Second Circuit went even further than the district court to hold that there is no due process barrier *at all* preventing already injured plaintiffs from negotiating away the legal claims of absent persons as long as those persons are not "known" — that is, no one (including them) knows that they will be injured and might wish to sue in the future. **A16**.

The court's rationale for this holding was that in *Phillips*

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[11] As respondents' brief below had noted in considerable detail, the Second Circuit "reviews exercise[s] of authority under the All Writs Act for abuse of discretion, and upholds the lower court's order unless the findings on which it is based were clearly erroneous." Brief for Defendants-Appellants, dated Nov. 16, 1992, at 60 (citations omitted).

Petroleum Co. v. Shutts, 472 U.S. 797 (1985), this Court addressed only the ability of named plaintiffs "to bind *known* plaintiffs" concerning money damages, and "intimate[d] no view concerning other types of class actions." **A16** (quoting 472 U.S. at 811 n.3) (emphasis added). Rather than reading this statement as disclaiming any holding about lawsuits for equitable relief (like the *Ticor Title* case now before this Court), the Second Circuit believed that it somehow would have "to extend *Shutts*" in order to prevent named plaintiffs from extinguishing the unaccrued claims of absent persons to money damages, before they even know those claims exist. **A16**. Refusing to "extend" *Shutts* to provide procedural guarantees to such persons, the court opined:

> [S]ociety's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. . . . [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good.

A17. The Second Circuit was also unconcerned that "'many genuine conflicts of interest' [can exist] in a situation such as this," so that separate class counsel should have decided whether to extinguish the unaccrued future claims of absent plaintiffs who had not yet suffered injury. **A17** (quoting district court). It opined that a conflict "never materialized" because all veterans became eligible for identical "nuisance value" payments from the Fund. **A18**.[12]

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[12] The Second Circuit suggested here that "ensuring that [persons unaware of their injuries] receive vigorous and faithful vicarious representation" was a constitutionally adequate substitute for the right to notice and to opt out. **A17**. Thus, the court refused to require that uninjured absent persons unaware of their rights have independent class counsel. Nor did the Second Circuit address the inherent conflict revealed by the district court's own rationale for denying notice or opt out: to advance the interests of presently injured plaintiffs and defendants in settlement. **A58**. Instead, the Second Circuit concluded from its own factual review that "[t]he unique circumstances" of this case rendered separate class counsel "unnecessary." **A21**.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DETERMINE WHETHER FEDERAL DISTRICT JUDGES MAY USE THE ALL WRITS ACT, IN THEIR DISCRETION, TO REMOVE AN "OTHERWISE UNREMOVABLE STATE COURT CASE"

The first question presented by this case is whether the Second Circuit is correct in permitting federal district judges to use the All Writs Act, as it put it, "to remove an otherwise unremovable state court case . . . 'when the need arises.'" **A9-10** (citation omitted). This case raises issues of judicial restraint and federalism so serious that a total of 21 States appeared as *amici* below to protest what they termed "an illegitimate judicial amendment of Congress's removal statute." Brief *Amici Curiae* at 18.

Whether removal can ever be effected by means other than the pertinent statutes enacted by Congress is a question on which the lower courts have divided, making review by this Court all the more critical. The Second Circuit, and two district courts in other circuits, have held that there *is* removal power under the All Writs Act.[13] Three circuits have disagreed, holding that only Congress's jurisdictional statutes can authorize jurisdiction in a case.[14] Still

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[13] *Hornsby v. Hornsby's Stores, Inc.*, 1991 WL 33672 (N.D. Ill. 1991) ("[s]tate claims precluded by the res judicata effect of a federal judgment may be removed to federal court" even when there is no basis other than the All Writs Act for removal); *Nowling v. Aero Servs. Int'l, Inc.*, 734 F. Supp. 733, 738 (E.D. La. 1990) ("Other statutes vest federal courts with the authority to exercise [removal] jurisdiction . . . for example, the All Writs Act").

[14] *See Westinghouse Elec. Corp. v. Newman & Holtzinger*, 992 F.2d 932, 937 (9th Cir. 1993) (All Writs Act does not "provide[] an independent source of removal jurisdiction to the district court"); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988) ("The right to remove a case from state to federal court derives solely from the statutory grant of jurisdiction in 28 U.S.C. § 1441"); *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1355 (10th Cir. 1972) ("Section 1651(a) does not operate to confer jurisdiction"); *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1972), *cert. denied*, 406 U.S. 945 (1972) ("This statutory provision does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists"); *M. Brittingham v. United States Comm'r of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971) ("[The All Writs Act] empowers [courts] to issue writs in aid of jurisdiction previously acquired on some other independent ground"). *See also United States v. Hall*, 583 F. Supp.

other courts have construed their removal power so narrowly that they have not even had occasion to reach the question decided by the Second Circuit. *See* note 15, *infra*.

A. The All Writs Removal Doctrine Is Constitutionally Indefensible and Should Be Repudiated in Its Entirety

The grounds for removal of cases from state court are simple enough. They are set out at 28 U.S.C. §§ 1441 to 1452. Seven distinct provisions exist:

(1) § 1441(a) (original jurisdiction removal);
(2) § 1441(d) (removal by a foreign state);
(3) § 1442 (removal by a federal officer or property holder);
(4) § 1442a (removal by a member of armed forces);
(5) § 1443 (removal in civil rights cases);
(6) § 1444 (removal in foreclosure actions against federal government); and
(7) § 1452 (removal of claims related to a bankruptcy case).

This set of provisions is the product of congressional deliberation about how much to restrict "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941).[15] The balance struck by

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717, 718 (E.D. Va. 1984) ("[T]he All Writs Act is not a means by which a district court may extend its authority in areas where it otherwise has no jurisdiction").

[15] The importance of deference to congressional choices in this area has led this Court to caution that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934). This Court has made the point in the specific context of removal jurisdiction. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18 (1951) ("To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit . . . would by act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress denied them"). *Cf. Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) (discussed in note 30, *infra*).

Congress has varied widely over time.

At one end of the spectrum, exhibiting maximum deference to the States, the Judiciary Act of 1789, 1 Stat. 73, 79-80, granted *no* federal question removal at all, and permitted removal in diversity cases in only three limited categories, and then only where substantial sums of money were at stake.[16]

In 1875, Congress went to the opposite extreme: its distrust of the States' judicial systems during the Reconstruction period was so great that Congress "enormously broadened the removal as well as the original jurisdiction," so that "virtually every case removable under Article III was made removable by *either* a plaintiff *or* a defendant."[17] This regime was of particular benefit to defendants,

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Many lower courts have emphasized the need narrowly to construe the removal statute. *See, e.g., United States ex rel. Walker v. Gunn*, 511 F.2d 1024, 1027 (9th Cir.) ("The right of removal being in derogation of state sovereignty, should not be enlarged beyond what is definite and free from ambiguity") (internal quotations and citations omitted), *cert. denied*, 423 U.S. 849 (1975); *Adams v. Aero Services Int'l, Inc.*, 657 F. Supp. 519, 521 (E.D. Va. 1987) ("Removal of civil cases to federal court is an infringement on state sovereignty. Consequently, the statutory provision regulating removal must be strictly applied."); *Mercy Hosp. Ass'n v. Miccio*, 604 F. Supp. 1177, 1179 (E.D.N.Y. 1985) (Weinstein, C.J.) ("The right to removal is a statutory grant to be strictly construed . . . . The defendant seeking removal must base the petition on a specific removal provision and specific grant of original jurisdiction").

[16] *See* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1767 (3d ed. 1988) (hereinafter "HART AND WECHSLER") (noting that only an alien defendant, an out-of-state defendant sued by a citizen of the forum state, or a party to certain kinds of title disputes, could remove if at least $500 was in dispute). Even *original* jurisdiction for federal question cases was extraordinarily limited in the first Judiciary Act. *See id.* at 961.

The severely limited removal jurisdiction authorized by Congress in 1789 is hardly surprising, given that "[m]any of the Framers of our Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285 (1970). Easing concern about federal courts encroaching on the judicial systems of the States, of course, was an important aspect of the effort to ratify the Constitution. *See, e.g.*, Alexander Hamilton, *The Federalist* No. 82 (C. Rossiter ed. 1961) 493 (explaining that "State courts will be deprived of no part of their primitive jurisdiction further than may relate to an appeal; and . . . in every case in which [state courts] were not expressly excluded" they will have "cognizance of the causes" arising under federal law).

[17] HART AND WECHSLER, *supra* note 16, at 961, 1052, 1767 (emphasis added) (citing Act of March 3, 1875, 18 Stat. 470).

permitting them to remove *merely by asserting a federal defense*. "[T]he answer as well as the complaint would be consulted before a determination was made" on whether a federal issue existed, and "the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 n.9 (1983).

Although the 1875 Act certainly constituted a "rational jurisdictional system," 463 U.S. at 10 n.9, it also caused a "flood of litigation" into the federal courts, leading Congress a decade later to "pare down the federal question jurisdiction."[18] Congress addressed the overload problem through the enactment of the Judiciary Act of 1887, which established the present pattern of removal jurisdiction.[19] The "key element" of the 1887 Act "was (and is) to tie removal jurisdiction to original jurisdiction," a requirement now found in § 1441(a) and one that "has had a profound impact on the jurisdictional structure."[20]

In light of Congress's "purpose [in the 1887 Act] to restrict the jurisdiction of the federal courts on removal," coupled with "[t]he power reserved to the states," this Court has given the Act a "strict construction." *Shamrock Oil & Gas Corp.*, 313 U.S. at 108. Accordingly,

> it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987) (emphasis in original) (citing *Franchise Tax Board*, 463 U.S. at 12).

The Second Circuit, however, has not been satisfied to adhere to the jurisdictional structure of the 1887 Act, narrowly construed, which allows much less removal than existed under the 1875 Act.

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[18] HART AND WECHSLER, *supra* note 16, at 963.

[19] *Id.* at 1768 (citing Judiciary Act of March 3, 1887, 24 Stat. 552, corrected by the Act of August 13, 1888, 25 Stat. 433).

[20] *Id.* at 1052-53.

Rather, the Second Circuit has taken the view that Congress's choice in 1887 to restrict the 1875 removal statute can be circumvented by judges based on reference to a *separate* law: the All Writs Act, of all things! That Act has remained substantially unaltered since 1789,[21] and has never been addressed by Congress in setting removal policy during the past two centuries. Yet, according to the Second Circuit, that Act provides an independent source of authority for subject-matter jurisdiction on removal.

Thus, beginning in 1988, the Second Circuit has explicitly permitted district judges to invoke the All Writs Act to justify removal even without "an independent basis for the exercise of jurisdiction under the federal removal statutes."[22] Accordingly, the district court below held that the All Writs Act "permits a federal court to remove state court actions to federal court in situations where *specific statutory removal authority is absent.*" **A55** (emphasis added). The Second Circuit confirmed that district judges "may remove an *otherwise unremovable* state court case . . . 'when the need arises,'" and upheld removal in this case as "appropriate" and "a proper exercise of judicial discretion." **A8-A9** (emphasis added) (citation omitted). Despite an early dissent from the doctrine, it now appears well entrenched in the Second Circuit.[23]

The Second Circuit's All Writs removal doctrine poses a threat to two fundamental aspects of this Court's jurisprudence: judicial restraint and judicial federalism:

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[21] The present version of the All Writs Act originated as § 14 of the Judiciary Act of 1789, 1 Stat. 81-82. *See Pennsylvania Bureau of Corrections v. United States Marshals*, 474 U.S. 34, 40-41 (1985).

[22] *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 865 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

[23] Dissenting in *Yonkers*, Judge Mahoney castigated the Second Circuit's creation of an All Writs removal doctrine to launch "a preemptive strike upon a state court" as "novel and unwarranted," pointedly noting that, like federal judges, state court judges are "sworn to support the Constitution of the United States. Accordingly the state court was entitled to a presumption at the outset" that it would proceed appropriately. 858 F.2d at 875 (Mahoney, J., dissenting). No other Second Circuit judge has ever dissented from use of the doctrine, however, and the suggestion below for rehearing *en banc* attracted no votes. Thus, the doctrine appears to be settled law in the Second Circuit.

For a more detailed description of *Yonkers* and the steadily increasing ambit of the Second Circuit's All Writs removal doctrine, *see* pp. 23-24, *infra*.

First, the doctrine constitutes "an illegitimate judicial amendment of Congress's removal statute," Brief *Amici Curiae* of the 21 States, at 18, that this Court should not permit to stand. It is well settled that "[a]ll federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Thus, whenever an objection is raised to removal, "[t]he fundamental question to be determined is whether the removal . . . from the state court into the Federal court was authorized by any statute of the United States." *Kentucky v. Powers*, 201 U.S. 1, 24 (1906). In resolving such an issue, of course, courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934).[24]

Despite these principles, the Second Circuit nonetheless permits a district court, in so-called "exceptional circumstances," to "use its All Writs authority to remove an otherwise unremovable state court case." **A8**. There are grave reasons to doubt this construction of the All Writs Act.

The language of the Act hardly suggests that it grants judges the power to *create or define* their own jurisdiction. Rather, it appears to provide tools for judges to use in *exercising* whatever jurisdiction they happen to possess — to "issue all writs necessary or appropriate *in aid* of their *respective* jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). The Second Circuit below refused to accept this limit, even as it quoted the express holding of this Court that the point of the All Writs Act is to "'empower[] federal courts to fashion extraordinary *remedies* when the need arises.'" **A9** (quoting *Pennsylvania Bureau of Corrections v. United States Marshals*, 474 U.S. 34, 43 (1985) (emphasis added)).

This Court was also quite clear in *Pennsylvania Bureau* that the Act must be set aside once Congress has spoken on a subject:

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[24] Since the inception of our federal system, it has been settled that "[c]ourts created by statute can have no jurisdiction but such as the statute confers," *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Where jurisdiction is not expressly conferred, it is assumed not to exist. *See Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810). *See also* note 15, *supra*.

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

474 U.S. at 43.[25] Congress, of course, could hardly have been more exacting in defining removal jurisdiction in 28 U.S.C. §§ 1441 to 1452, and thus it is difficult to see why any judge should be permitted to look beyond those carefully crafted provisions and infer subject-matter jurisdiction in the "exercise of judicial discretion" (**A9**) under the All Writs Act. Indeed, at least two decisions of this Court have resisted far more modest arguments that the Act should be used to supplement the structure of appellate jurisdiction and procedure established for this Court by Congress.[26]

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[25] The facts of *Pennsylvania Bureau* illustrate the limits of judicial authority even when fashioning remedies where jurisdiction itself is clear. This Court refused to allow a federal district court to exercise its All Writs power to compel federal Marshals to share in the financial burden of transporting state inmates to federal courts for litigation in which the state is not involved, where the Marshals' obligations were regulated by a somewhat ambiguous federal statute. 474 U.S. at 37-38, 43. The arguments for permitting district courts to seize "otherwise unremovable" state court cases contrary to a clear federal removal statute are obviously much weaker.

[26] In *Chandler v. Judicial Conference of the Tenth Circuit*, 398 U.S. 74 (1970), District Judge Chandler invoked the All Writs Act, asking this Court to reverse the decision of the judges of the Tenth Circuit to strip him of his judicial functions, in an alleged usurpation of the impeachment power. *Id.* at 75, 82. The Tenth Circuit Judicial Council argued that Chandler was complaining of "purely administrative action" that had "never been reviewed in any court and cannot now be reviewed in an original proceeding under the All Writs Act." *Id.* at 83. The Solicitor General argued that a finding of jurisdiction was proper under the All Writs Act because the action of the Judicial Council could be "analogized" to the Tenth Circuit sitting *en banc*, in an appellate function. *Id.* at 83-84. This Court rejected that argument, explaining that the All Writs Act "authority of this Court to issue a writ of prohibition or mandamus 'can be constitutionally exercised only insofar as such writs are *in aid of its jurisdiction*,'" and holding that review of Chandler's claims would "do[] violence to the constitutional requirement that such review be appellate." *Id.* at 86 (emphasis added) (citation omitted).

Similarly, in *United States v. FMC Corp.*, 1963 U.S. LEXIS 2449 (1963), (Goldberg, Circuit Justice), this Court rejected the Solicitor General's argument that the All Writs Act authorized immediate review in this Court of a district judge's refusal to issue a preliminary injunction against an imminent corporate acquisition. The relevant statute permitted immediate appeal only from *final*

This case is especially suited for testing the outer limits of the All Writs Act, for here the Second Circuit has sought to countermand a considered policy judgment of Congress. The district court upheld removal of petitioners' Texas state court case on the basis of defendants' argument that "the binding effect of the Settlement Agreement" barred petitioners' lawsuit. **A55**. Even assuming that the interpretation of the Settlement Agreement (essentially, a contract negotiated in New York) raised *any* issue of federal law, at most the defendants have a *federal defense* to suit in Texas state court. But more than a century ago Congress barred any such theory for removal, *see* pp. 13-14, *supra*, and has so far rejected all proposals to water down its stance.[27] The Second

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judgments, but the Solicitor General argued that appellate jurisdiction should be found under the All Writs Act "to prevent irreparable change in the economic status quo . . . [that would] frustrate effective public relief." *Id.* Despite these exigencies, the Circuit Justice ruled that the All Writs Act "may not be employed to evade the specific restrictions" of the jurisdictional statute, and that no writ could issue "as a substitute for an authorized appeal."

The course taken by the Second Circuit — to use the All Writs Act to remove state court cases that Congress chose to leave to the state courts — is far more radical than the course suggested by the Solicitor General in either of these cases. By contrast, other lower federal courts have refused to use the All Writs Act even to review *federal* cases outside their direct line of review. *See, e.g.*, *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976); *General Electric Co. v. Byrne*, 611 F.2d 670, 672 (7th Cir. 1978) (*per curiam*) ("We are aware of no statute or decision which would authorize us to issue a writ of mandamus directed to a district judge sitting in another circuit"); *C.P.C. v. Nosco Plastics, Inc.*, 719 F.2d 400, 401 (Fed. Cir. 1983) (All Writs Act does not confer authority to review decisions of a district court over which the appellate court does not have supervisory power).

[27] "Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive." *Franchise Tax Board*, 463 U.S. at 10 n.9 (citing proposals). Unfortunately for defendants, of course, "those proposals have not been adopted." *Id.*

Notably, Congress has rejected some reform proposals a good bit *narrower* than the course taken by the courts below. For example, in 1969, the American Law Institute proposed that federal removal jurisdiction be expanded so as to permit removal if "a substantial defense arising under the Constitution, laws, or treaties of the United States [were] properly asserted." ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, § 1312(a)(2) (1969). Even under the ALI plan, however, this case could not have been removed from state court, because that proposal excluded from removal those "actions in which the only ground for removal [would be a] claim that the suit or relitigation of an issue in the suit is barred by an adjudication from another

Circuit's attempt to serve, to borrow an apt phrase, as "a sort of junior-varsity Congress," *Mistretta v. United States*, 488 U.S. 361, 427 (1988) (Scalia, J., dissenting), should be overturned.

Second, beyond the Second Circuit's circumvention of well-accepted principles of judicial restraint, certiorari is also warranted because its blanket grant of permission to remove cases whenever district judges find "exceptional circumstances" flouts this Court's teachings on judicial federalism and the respect due the coordinate judicial systems of the States.

In explaining the "exceptional circumstances" supposedly requiring that this case be removed, the Second Circuit made little effort to mask its distrust of the abilities of the Texas state courts. Permitting the case to go forward in Texas would have a "deleterious effect," according to the Second Circuit, because the state court would have to "decid[e] the scope" of the 1984 settlement and the associated due process issues. **A8-A9**. The Second Circuit thought it critical that the judge who "approved the settlement" — the judge "*best situated* to make this determination" — decide the preclusive effect of the prior settlement agreement. **A9** (emphasis added). State courts apparently cannot be trusted to "guard[] the integrity of [federal court] rulings in complex litigation." *Id.*

Obviously, the Texas state courts in this case should have been presumed competent to adjudicate the preclusive effect of the 1984 settlement.[28] If state courts are competent to determine federal

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court that the Constitution or laws of the United States require the State court to honor." *Id.* at § 1312(b)(9). *See also* "Multiparty, Multiforum Jurisdiction Act," H.R. 3406, 101st Cong. 2d Sess. (1990) (another proposed jurisdictional expansion much more modest than the court's holding in this case which was rejected by Congress).

[28] As one esteemed scholar of federal courts doctrine incisively observed, there is "nothing more subversive to the judge's inner sense of responsibility than the notion that, to the greatest possible extent, all the important shots will be called by someone else because we don't believe in his or her competence and sensitivity." Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 624 (1981). As an essential feature of comity, state courts are routinely entrusted with the adjudication of federal rights, including federal constitutional rights. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988) ("Texas state courts . . . are presumed

constitutional rights, then *a fortiori* there is no basis for denying them responsibility for adjudication of the preclusive effect of a settlement. Indeed, one key feature of judicial federalism is that federal and state courts alike are trusted to give appropriate effect to the results of litigation in the other judicial system. *See Kline v. Burke Const. Co.*, 260 U.S. 226, 230 (1922) ("Whenever a judgment is rendered in one of the courts [either federal or state] and pleaded in the other, the effect of that judgment is to be determined by" the second court"); *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964).[29]

As 21 States trenchantly observed in their *amicus* brief below:

> For as long as there has been a common law . . . when a prior judgment of a court in another jurisdiction, whether

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competent to resolve federal issues"). *See also* Bator, at 625 ("If we want state judge to feel institutional responsibility for vindicating federal rights, it is counterproductive to be grudging in giving them the opportunity to do so").

[29] These precedents comport with a fundamental principle of our federal system, that "[a] state court is as well qualified as a federal court to protect a litigant by the doctrines of res judicata and collateral estoppel." *Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960); *accord Bluefield Community Hospital Inc. v. Anziulewicz*, 737 F.2d 405, 408 (4th Cir. 1984).

Consistent with this principle, in the area of consent judgments it is quite unusual for a court to hold, as the Second Circuit below did, that the individual judge who reviewed and approved a settlement has a special, subjective insight into its meaning. For example, in one prominent case the D.C. Circuit refused to defer to Judge Harold H. Greene's subsequent interpretations of a consent decree provision that *he himself* had drafted in the case that broke up the Bell System, despite Judge Greene's decade of intensive experience with that enormously complicated case. *See United States v. Western Electric Co.*, 900 F.2d 283, 293-94 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990). The D.C. Circuit ruled that although an appellate court should "take careful account of the explanatory opinion issued by the district judge at the time the decree was entered," *id.* at 294 n.10, it had to "reject [any] suggestion" Judge Greene's later view of the decree "should be afforded some 'special' deference," even though he had a major part in "draft[ing] the pivotal provision" and even though he "had enormous experience overseeing the case and the decree since its inception." *Id.* at 294. *See also Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (making clear that "[a] district court's interpretation of a consent judgment is a matter of law and freely reviewable on appeal"). Obviously, if federal appellate courts should not defer to the subjective views of district judges on the meaning of settlements, then state courts need not defer — and cases should not be removed from state courts in an effort to ensure that a particular individual rules on what the parties appear to have intended by a certain settlement.

> state or federal, has been raised as a bar to litigation of a claim, the issue has been decided by the court at hand, not referred back to the court that entered the original judgment.

Brief *Amici Curiae* at 3 (emphasis in original). The States objected that the district court had "supplanted this time-tested rule with a radical new one: when a federal class action judgment is involved, *only* the court that handed down the original judgment is qualified to decide" the preclusive effect of the prior settlement. *Id.* (emphasis in original). They pointed out that this theory is "contrary to common sense" and "destructive of judicial federalism," *id.*, and called the district court's seizure of the case on this theory an "unprecedented, unwarranted, and unwise . . . invasion of state judicial independence and an insult to state courts throughout the nation, which are perfectly capable of deciding whether a state law claim is barred by a prior federal judgment." *Id.* at 18.

The States warned that "[t]o affirm the decision below would be to invite every federal district court to circumvent the removal statutes and other specific jurisdictional legislation and to transform the All Writs Act into a general grant of federal jurisdiction and a broad license to interfere with state court proceedings." *Id.* at 16. Yet the Second Circuit analyzed *none* of these federalism concerns, failing to mention the States' arguments even in passing. Indeed, in the aspect of its opinion most dangerous for judicial federalism, the court made clear that district judges are free to resort to All Writs removal in the "exercise of judicial discretion" whenever they believe "'the need arises.'" **A9**. Thus, *ad hoc* seizure of state court jurisdiction is given no more appellate scrutiny than is afforded garden-variety trial court evidentiary determinations. *See, e.g., Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962) (describing leniency of evidence review standard).

Finally, it should be noted that the Second Circuit's expansive view of removal jurisdiction under the All Writs Act, in derogation of state courts, also contravenes the policies of the Tenth Amendment.[30] Indeed, because what is at issue is a federal

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[30] One of the "powers [reserved to the states under the Amendment] was the maintenance of state judicial systems for the decision of legal controversies." *Atlantic Coast Line R.R.*, 398 U.S. at 285. *See also Pennzoil Co. v. Texaco,*

judicial act, not subject to the "political checks" of federalism, *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528, 549-51 (1985), this Court should be particularly sensitive to the Tenth Amendment interests implicated here.

Certainly, the judgment below cannot be defended on the theory that removal was necessary to protect the district court's continuing jurisdiction. First, a state court must be presumed to be competent to adjudicate the settlement's preclusive effect. *See* notes 28 & 29, *supra*. A federal court obviously cannot assume, as the district court did below, that a state court would incorrectly adjudicate this question and would erroneously permit plaintiffs "to undermine a settlement agreement and set aside a federal court's judgment through new state court suits." **A54**.

Second, in any event, the district court's continuing jurisdiction in this case could not have been threatened by petitioners' Texas action. Their case manifestly was not, despite the district court's assertion, a "challenge[]" to the settlement agreement. **A49**. Rather, petitioners sought to pursue their own suit for money damages, entirely separate from the settlement, on the ground that they were not bound by it. The settlement agreement provided that the district court would retain jurisdiction *only* "over the Fund pending its final disposition," *Agent Orange*, 597 F. Supp. at 866 (Settlement Agreement ¶ 19), with a duty "to assure that the Fund shall earn the maximum interest consistent with safety and that all disbursements are properly made." *Id.* at 864 (Settlement Agreement ¶ 4). Nothing about petitioners' Texas lawsuit affects the

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Inc., 481 U.S. 1, 12-13 (1987) ("This Court repeatedly has recognized that the States have important interest in administering certain aspects of their judicial systems.") Given that the integrity of an important state institution is at stake, this Court should accord review to a judicial interpretation of the All Writs Act that deprives state courts of their traditional authority to resolve the preclusive effect of judgments of another sovereign. Accordingly, in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), this Court refused to read a federal statute, the Age Discrimination in Employment Act, so as to constrain state judicial systems by forbidding mandatory retirement of state court judges. *Id.* at 2408. *Cf. New York v. United States*, 112 S. Ct. 2408, 2428 (1992) (Tenth Amendment prohibits federal statutes which are interpreted to "infring[e] upon the core of state sovereignty . . . a state's ability to make and *apply* its own laws") (emphasis added). Thus, in light of the Tenth Amendment, federal statutes should not be construed to impinge on fundamental state institutions without a clear statement of congressional intent requiring that outcome. No such clear statement appears on the face or in the legislative history of the All Writs Act.

operation of the Fund. The prospect that respondents may have to invoke, in a Texas forum, the supposedly preclusive effect of the settlement clearly has no bearing on the Fund; on the contrary, ¶ 4 of the Settlement Agreement expressly provides that at this juncture respondents "have no responsibility or obligation with respect to the Fund or distributions therefrom." *Id.* at 864.

Finally, the availability of authority under the All Writs Act to issue *injunctions* "in aid of . . . jurisdiction[]" indicates that there is no power to *remove* a state court action on that basis. Indeed, Congress went so far as to enact an exception to the Anti-Injunction Act using these same words. *See* 28 U.S.C. § 2283 (exception "where necessary in aid of its jurisdiction"). Thus, Congress was careful to vest the federal courts with targeted equitable powers even against state courts; but it also made the deliberate decision not to provide federal courts with sweeping *removal* authority. To ignore the fundamental difference between the two, and to read into the removal statute a power to disrupt state proceedings that Congress has set out only in the context of injunctions, would effectively rewrite Congress's handiwork.

B. Even If the All Writs Act Authorizes Lower Courts to Remove an "Otherwise Unremovable State Court Case" in Some Situations, This Court Should Articulate Clear Limits on the Use of That Power

Although All Writs removal is inappropriate in all circumstances, certiorari would be warranted even if this Court were inclined to reject that contention. At minimum, review should be granted to check the Second Circuit's spiraling pattern of jurisdictional expansion and to clarify the boundary of lower courts' authority under the All Writs Act.

As previously noted, the Second Circuit's All Writs removal doctrine originated in *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). See p. 15, *supra*. The City of Yonkers had pursued a policy of racial segregation in allocating public housing and, as a result, had violated minority housing residents' federal constitutional and statutory rights. Under the obligation of a federal court order, the city sought to remedy this violation by initiating condemnation proceedings in state court. Although the case was not otherwise

removable, the Second Circuit permitted removal under the All Writs Act because the district court was confronted "both with the need to vindicate the constitutional rights of those . . . who have been denied fair housing and the very real possibility that the City of Yonkers would be subjected to inconsistent orders from the state court and the federal court." *Id.* at 863.

The Second Circuit substantially broadened the doctrine in *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992), this time upholding All Writs removal even absent the need to vindicate federal constitutional rights. Faced with a state court suit concerning the validity of procedures under a federally ordered sewage disposal plan, the court held that the mere possibility that New York might be subject to inconsistent federal and state decrees alone was sufficient to justify removal. *Id.* at 469.

Unlike the Second Circuit's earlier cases involving its novel removal doctrine, however, this case presents *no* threats to respondents' or third parties' constitutional rights, and *no* possibility that respondents might be subject to conflicting state and federal injunctive orders.[31] In short, this case presents *neither* of the rationales supporting the *Yonkers* or *City of New York* decisions. The courts below nevertheless approved removal yet again, this time of a quintessentially state-law case, finding the existence of "exceptional circumstances" — here, the courts' view that the Texas state courts might rule incorrectly on whether the 1984 settlement precluded suit, whereas the district court here was "best situated" to rule correctly. See pp. 9, 19, *supra*.

Certiorari was not sought in *City of New York*, and the certiorari briefing in *Yonkers* revealed an inappropriate vehicle for review.[32]

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[31] Petitioners' claims seek monetary relief.

[32] *Yonkers* was the Second Circuit's initial use of the All Writs removal theory, and the petition for certiorari presented the issue in nine pages as one involving error on the facts of the case. Petition for Certiorari, *Yonkers Racing Corp. v. City of Yonkers*, No. 88-1029, at 7-15. Indeed, Rex Lee appeared on behalf of the City of Yonkers opposing certiorari, stating that "the decision is sui generis" and that petitioner had "argue[d] only that the decision is 'based upon a misapplication of a recent decision of this Court.'" Brief of Respondent City of Yonkers in Opposition, No. 88-1029, at 12-13 (quoting petition). Finally, although the City agreed that the Second Circuit had erred in using the All Writs Act to remove the case, *id.*, it nonetheless urged: "The error below is, in the

This case thus represents the first real opportunity for scrutiny of the Second Circuit's radical All Writs removal doctrine, and certiorari is warranted to put an end to "an illegitimate judicial amendment of Congress's removal statute." Brief *Amici Curiae* at 18.

II. THIS COURT SHOULD PASS ON THE ACCEPTABILITY OF A QUASI-LEGISLATIVE ANALYSIS FOR DETERMINING WHETHER ALREADY INJURED NAMED PLAINTIFFS MAY EXTINGUISH THE UNACCRUED FUTURE CLAIMS OF ABSENT PERSONS

Even if federal removal jurisdiction somehow existed in this case (or if this Court were to decline to review that question), there would be a further question worthy of certiorari: under Fed. R. Civ. P. 23 and due process, in what circumstances (if any) may *already* injured named plaintiffs, in a Rule 23(b)(3) class action for money damages, contract to extinguish the unaccrued *future* claims of absent persons? This Court is currently considering similar issues in a related context, that of non-opt out, Rule 23(b)(2) class actions, in *Ticor Title v. Brown*, No. 92-1988. But the issues in this case merit review regardless of the outcome in *Ticor Title*.

As illustrated by *Ticor Title* and the several other major class action cases this Court has reviewed, the procedural standards governing the conduct of class actions are extremely important and affect large numbers of litigants. The extent to which federal settlements of Rule 23(b)(3) class actions may bind individuals who are not even aware that they have suffered injury is an issue which this Court has never addressed and which is now of significant and growing importance.[33] This is particularly true in our complex

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circumstances of this case, purely a procedural one. Because the district court clearly was correct in its ultimate conclusion that the City should prevail in the condemnation proceedings, any reversal now would merely delay the ultimate implementation of the district court's remedial orders." *Id.* at 13.

[33] *See, e.g., Carlough v. Amchem Prods., Inc.*, No. 93-1429, 1993 U.S. App. LEXIS 24930 (3d Cir. September 29, 1993) (discussing certification of 23(b)(3) class of future asbestos claimants); *Dante v. Dow Corning Corp.*, 143 F.R.D. 136, at *4 (N.D. Ohio 1992) (conditionally certifying a nationwide 23(b)(3) class of future silicone breast implant claimants); *In re Breast Implant Litig.*, 1992 U.S. Dist. Lexis 10080, at *4 (May 21, 1992, N.D. Ohio)

technological society, in an era when tens of thousands of persons may become injured by toxic substances or dangerous products, but will not manifest observable harm until years later.

The concept of adjudicating or settling through a class action the interests of persons who are completely unaware of any injury, although they have been placed at risk in some manner by a potential defendant, is quite controversial in itself. As the Advisory Committee observed in an oft-quoted Note to the 1966 Amendments to the Federal Rules of Civil Procedure, "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action" because of the preponderance of individualized issues involved. Although class actions in the mass accident and even mass tort context have won increasing acceptance, they have almost always been limited to class members who have manifested some sort of perceptible injury, know that they may have a legal interest, and thus are in a position intelligently to evaluate whether to be part of a class action.

Binding persons to the results of a class action prosecuted by others when they *do not* know they have been injured and at most have a unaccrued *future* claim for injury is problematic on at least three levels. First is a concern about basic fairness. In the statute-of-limitations context, for example, this Court has been unwilling to foreclose victims' legal interests based on "blameless ignorance," refusing to permit rights to lapse on the theory that people should be "charged with knowledge" of risks to which they have been unknowingly exposed. *Urie v. Thompson*, 337 U.S. 163, 169-170 (1949). This concern is compounded by the unavoidable conflict of interest between already injured plaintiffs and those who will develop illnesses in the future. Even in the absence of venality or corruption, the *former* group of plaintiffs, and their attorneys, have a natural incentive to settle the claims of the *latter* at relatively low value, in order to make a settlement as likely as possible by making the settlement package as attractive as possible for the defendant.

Second is the issue of standing: to the extent that resolution of a class lawsuit depends on the adjudicatory power of an Article III court, it may be illegitimate to include persons who have manifested

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(amending class definition to include "persons who are likely to suffer or are at an increased risk of suffering any adverse medical condition as a result ... of having received a silicone gel breast implant").

no perceptible injury from a possible risk to which they may have been exposed.[34]

Third, beyond the basic "case or controversy" question, the idea that federal judges should supervise the negotiation and final settlement of the substantive legal claims of absent persons before these claims have even accrued strains traditional concepts of the judicial role. An excellent benchmark for evaluating such a role is provided by the dissent in *Hoffman-La Roche, Inc. v. Sperling*, 110 S. Ct. 482, 488 (1989) (Scalia, J., joined by Rehnquist, C.J.). That case upheld somewhat novel "case management" techniques by a district judge in an age discrimination case. The judge assisted the main plaintiff in discovering the names of potential plaintiffs who might wish to join the case, and supervised the notice they would receive. The dissenters argued that even *case management* of such *future* cases, involving known potential plaintiffs who would have to opt in to be bound, was "an extraordinary application of the federal judicial power," at odds with "a system in which courts are not inquisitors of justice but arbiters of adversarial claims." *Id.* at 489, 492. Far more extraordinary, of course, is the practice of judges empowering private parties in a case like this one to *extinguish* the legal claims of absent persons before those claims have accrued.

Such concerns have led a number of commentators to argue that the difficulties inherent in analyzing the interests of those who do not yet know that they are injured, and particularly in notifying them of their rights, should preclude *all* class action settlements that seek to bind such persons.[35] Such an outcome is certainly one

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[34] A hypothetical claim, like those of petitioners' in 1984, *see* note 10, *supra*, would appear not to have a "high degree of immediacy," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2138 (1992), nor to be "certainly impending"; rather, such a claim seems merely "abstract" and too "conjectural or hypothetical" to confer standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal quotes and citations omitted).

[35] *See, e.g.*, 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Action* § 17.39, at 17-119 (3d ed. 1992) ("Anytime a mass tort gives rise to injuries that occur over a period of time . . . inevitably there will be claims that arise in the future after an action for his mass tort has been permitted to be maintained an adjudicated as a class action. Those unaccrued future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples."); Elizabeth R. Kaczynski, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85

option for this Court's consideration that the principal attraction of the instant case is that it presents a significant vehicle for any range of holdings — even [illegible] in this Court's first consideration of the problem [illegible], absent plaintiffs who lack present awareness of any injustice.

The basic due process requirements on which this Court has insisted for Rule 23(b)(3) class actions for money damages have been adequate representation, notice, and a chance to opt out. This Court has long held that, in general, "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). In class actions "the Due Process Clause of course requires that the named plaintiff at all times *adequately represent* the interests of the absent class members." *Phillips [illegible] Shutts*, 472 U.S. 797, 812 (1985) (emphasis added).

Additionally, a class [illegible] not binding on absent class members unless each [illegible] member receive[s] *notice* plus an opportunity to be heard and participate in the litigation." *Shutts*, 472 U.S. at 812 (emphasis added); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 314-315, 319 (1950) (requiring "notice reasonably certain to reach most of those interested in objecting"). Moreover, due process requires that each absent plaintiff be permitted to opt out of the class. *Shutts*, 472 U.S. at 812.[36]

On the record of this case, *all* these procedural protections were denied. The named plaintiffs to the 1984 *Agent Orange* litigation,

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COLUM. L. REV. 397, 398 n.7 (1985) (the "future members cannot be included in (b)(3) actions.") *Cf.* Marck C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 J. OF L. REFORM 374, 374 (1988) ("problem with [Rule 23] is that this binding res judicata effect extinguishes the class member's cause of action, yet there is no assurance that the class member will ever have heard about the action, much less have had influence over its litigation").

[36] Such notice and opt-out rights are critical because they "protect [each] claimant's right to control her litigation." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986). *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982) (holding that the right to use adjudicative procedures is a species of property protected by the due process clause).

who agreed to the ultimate settlement, all had already suffered "severe and permanent disabling injuries." *See* p. 5, *supra*. These plaintiffs were obliged to sue prior to the expiration of the applicable statute of limitations, despite the paucity of the scientific evidence then available. *See* p. 7 & note 9, *supra*. As the district court acknowledged, the interests of petitioners and others who in 1984 were not suffering from any injury, *see* note 10, *supra*, were directly adverse to "the interests of presently injured plaintiffs as well as defendants in achieving a settlement." **A58**.

The named plaintiffs made no effort to notify absent persons who were not suffering from injury. Rather, over defendants' objection, they and the district court defined, and directed notice to, a class consisting *only* of persons who subjectively believed that they were suffering compensable injuries as a result of Agent Orange. *See* pp. 5-6 & note 5, *supra*. Then, once the opt-out deadline had passed, the named plaintiffs vastly expanded the class that would be bound, to include anyone who might *ever* manifest any injury in the future. *See* pp. 6-7, *supra*. Conceivably, the settlement agreement might have expressly *preserved* the claims of these future plaintiffs; instead, it abolished them. The district court's explanation for the parties' contractual agreement to extinguish the rights of hundreds of thousands of people, none of whom was at the bargaining table, was that the parties at the table were "[c]oncerned with the potential for new actions and recogniz[ed] the need for finality." **A35**. No notice and opt out rights for the new class members were even considered.

Thus, petitioners were denied *all* of the bedrock requirements of Rule 23 and due process at the hands of private parties who negotiated to extinguish petitioners' legal claims before they had even accrued. This "might in another context be a bureaucratic success story," but here it has "serious constitutional ramifications." *Morrison v. Olson*, 487 U.S. 654, 684 (1988).

The Second Circuit was likewise unwilling to enforce the minimum procedural guarantees applicable in the class action context. Despite the conflict of interest that the district court had candidly acknowledged, **A58**, the court below dismissed any concern here, with the assertion that harm from any conflict had "never materialized." *See* p. 10, *supra*. And in a bizarre reading of this Court's decision in *Shutts*, the court below opined that, as long as absent plaintiffs are *unknown*, a court may dispense with

notice and opt-out rights entirely if it deems the benefits of these core protections to be "conjectural" and outweighed by "society's interest" in resolving complex litigation. *See id.*

The Second Circuit's focus on "society's interest" and its disregard for individual procedural guarantees may be acceptable in the legislative arena but cannot be squared with the functioning of a life-tenured judiciary. *Cf. Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 444-45 (1915) ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule"). As Judge Patrick Higginbotham cautioned in a similar context, in invalidating an innovative quasi-administrative scheme for trying asbestos cases: "The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more." *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

Thus, at its root, the second question in this case presents the Court with an opportunity to insist that the lower courts apply traditional Rule 23 and due process analysis to the unaccrued future claims of absent plaintiffs, and an opportunity to reject the sort of quasi-legislative analysis relied on by the Second Circuit.

CONCLUSION

For all these reasons, certiorari should be granted.

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November 24, 1993

APPENDICES

APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit, affirming the district court's refusal to remand the case and its dismissal of petitioners' claims, dated June 24, 1993 . . . . . A1

APPENDIX B

Decision of the United States District Court for the Eastern District of New York, refusing remand and dismissing petitioners' claims, dated October 4, 1991 . . . . . A26

APPENDIX C

Decision of the District Court denying Rule 59 motion for reconsideration except in part, and denying motion under 28 U.S.C. § 455(a), dated November 12, 1991 . . . . . A60

APPENDIX D

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APPENDIX E

Text of Federal Rule of Civil Procedure 23 . . . . . A64

APPENDIX F

Affidavits of Shirley Ivy, dated February 22 and 27, 1991 . . . . . A68

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 92-7537, 92-7573, 92-7575

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION,

SHIRLEY IVY, Individually and as Representative of the Estate of Donald Ivy, Deceased; CHARLES JARDON and TONY K. JARDON, Individually and as Next Friend of Charles Jardon, Jr.; ROBIN JARDON, WARREN JARDON and SHARON JARDON; VERDA WILSON, Individually and as Representative of the Estate of Isaiah Wilson, Jr., Deceased; SHIRLEY ZALEWASKI, Individually and as Representative of the Estate of Yen Zalewaski, Deceased; GARY THOMAS; MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, Individually and as Representative of the Estate of Bobby Joe Inman, Deceased; EARL THOMPSON; JUDY L. THOMPSON; JAMES DONALD DELOATCH; JOYCE DELOATCH; PEGGY SANDS, Individually and as Representative of the Estate of Martin Sands, Deceased; EMILE ANNIBOLLI; URSULA MARGOT PARRY, Individually and as Representative of the Estate of James D. Parry, Sr., Deceased; JAMES D. PARRY, JR.; JAMES CHRISTOPHER PARRY; LAURA JENKINS, Individually and as Representative of the Estate of Eddie Jenkins, Deceased; RONALD L. HARTMAN, KATHERINA H. HARTMAN, and as Next Friend to JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, Both minors individually and as Representative of those similarly situated,

Plaintiffs-Appellants,

JAMES WHITE, Individually and as Representative of the Estate of Clarence White, Deceased; CHARLES BROWN,

Plaintiffs-Appellants,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, also known as Diamond Shamrock Refining & Marketing Company, also known as Occidental Electro Chemical Corporation, also known as Maxus Energy Corp., also known as Occidental Chemical Corporation, also known as Diamond Shamrock Co.; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T.H. AGRICULTURE & NUTRITION COMPANY, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

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JUNE 24, 1993

Before: VAN GRAAFEILAND, KEARSE and CARDAMONE,

Circuit Judges.

VAN GRAAFEILAND, *Circuit Judge*:

Two groups of veterans and their family members, who sue both individually and on behalf of others similarly situated, appeal from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.) dismissing their tort claims against seven chemical companies which manufactured the defoliant Agent Orange. *Ryan v. Dow Chemical Co.*, 781 F.Supp. 902 (E.D.N.Y. 1991). In addition to their claim of

substantive error, appellants contend that the district judge erred in refusing to remand their cases to the state court from which they were removed and in denying their motion that he disqualify himself for conflict of interest or appearance of partiality. For the reasons that follow, we affirm.

These actions are an attempted revival of the massive tort litigation (collectively "*Agent Orange I*"), which arose from the United States Armed Services' use of Agent Orange during the Vietnam War. Because both the history of the litigation and the background of the instant actions have been chronicled in the opinion below, 781 F.Supp. at 904-14, a brief summary will suffice for present purposes.

While serving in Vietnam, several hundred thousand soldiers were exposed to Agent Orange, which contained traces of the chemical 2,3,7,8-tetrachlorodibenzo-p-dioxin ("dioxin"). Following their return home, many veterans complained of illnesses, which they attributed to this exposure. In 1978, these veterans began to seek redress through the courts, suing both the United States and the manufacturers of Agent Orange.

In 1979, the Judicial Panel on Multidistrict Litigation consolidated hundreds of the cases and transferred them to the Eastern District of New York. Subject matter jurisdiction over these cases originally was based on the asserted existence of a question of federal common law, but, after we reversed on this issue, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981), jurisdiction was found to exist on the basis of diversity of citizenship.

In December 1983, the district court certified a Rule 23(b)(3) "common question" class with opt-out rights in order to address the common issues of general causation and the military contractor defense, and a Rule 23(b)(1)(B) "limited fund" class for punitive damage claims. 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). The Rule 23(b)(3) class was defined as:

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 729. Notice was provided to class members by mail where feasible and by advertisements in the print and broadcast media. *Id.* at 729-30. The deadline to opt out of the Rule 23(b)(3) class was May 1, 1984; 2,440 potential plaintiffs opted out by the deadline, although all but 282 eventually opted back into the class.

A tentative settlement was reached on May 7, 1984, the day the trial was scheduled to begin. The Settlement Agreement provided for the establishment of a $180 million settlement fund to cover all claims arising out of Agent Orange exposure, and a claim against this fund was made the exclusive remedy for all class members. A $10 million reserve was created to indemnify the defendants for any state court judgments obtained by class members. The Settlement Agreement stated that "[t]he Class specifically includes persons who have not yet manifested injury," and it forever barred class members from instituting or maintaining an action against defendants based on exposure to Agent Orange. *See* 597 F.Supp. 740, 862-66 (E.D.N.Y. 1984) (reprinting Settlement Agreement).

The settlement was approved on September 25, 1984 after extensive, nationwide fairness hearings, *see id.* at 740-862, and the approval was reaffirmed on January 7, 1985, *see* 611 F.Supp. 1296, 1347. On July 9, 1985, the district court granted an order directing consummation of the settlement "in accordance with its terms," dismissing all class members' claims, permanently barring class members from instituting or maintaining future actions arising from Agent Orange exposure, and retaining jurisdiction over the maintenance, administration

and distribution of the settlement fund. 618 F.Supp. 623, 624-25 (E.D.N.Y. 1985). The court also granted summary judgment against the opt-out plaintiffs based on their failure to prove causation and on the military contractor defense. 611 F.Supp. 1223 and 1267 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). We affirmed the certification, maintenance and settlement of the class action in all significant and relevant respects. 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

The final distribution plan for the settlement fund was announced on July 5, 1988 following the termination of all appeals. 689 F.Supp. 1250. Roughly three-fourths of the fund, which by then had grown to approximately $240 million, was allocated to the Agent Orange Veteran Payment Program. This Program provides payments on the death or disability of class members. By September 30, 1991, it had disbursed over $86 million and had processed more than fifty thousand claims. Twenty-eight percent of the disability claims processed by the fund were for disabilities manifesting themselves after May 7, 1984; more than half of the death claims were for deaths occurring after May 7, 1984. 781 F.Supp. at 910. By September 30, 1992, the Payment Program had disbursed more than $146 million to disabled veterans or their survivors and had processed more than sixty thousand claims. *Report of the Special Master on the Distribution of the Agent Orange Settlement Fund*, Fourth Annual Report, at 11-12.

Most of the remaining quarter of the settlement fund was allocated to the Agent Orange Class Assistance Program ("AOCAP"), which made grants to agencies serving Vietnam veterans and their families. Among the activities assisted by those grants were veteran counselling, aiding the obtaining of Government veterans' benefits, and administering training programs for agencies dealing with Vietnam veterans and their employees. As of September 31, 1992, AOCAP had awarded roughly $33.6 million in grant funds, benefitting more than 101,000 veterans and family members nationwide. *See* Fourth Annual Report, *supra*, at exh. D. That portion of the $10 million indemnity

reserve that will not have been used to satisfy state court judgments by 1994 will revert to this fund. Originally, the district court provided for management of the AOCAP fund by an independent foundation. We reversed on this point and ordered that Judge Weinstein maintain direct oversight of the Program. 818 F.2d 179, 184-86 (2d Cir. 1987). In managing AOCAP, Judge Weinstein consults with an advisory board of Vietnam veterans.

In 1989 and 1990, two overlapping class actions, *Ivy v. Diamond Shamrock Chemicals Co.* and *Hartman v. Diamond Shamrock Chemicals Co.*, were brought in Texas courts. Both alleged that the named plaintiffs or their family members suffered injury as a result of Agent Orange exposure and that the injuries sustained by these plaintiffs did not manifest themselves or were not discovered until after May 7, 1984, the *Agent Orange I* settlement date. Both complaints sounded exclusively in state law and explicitly abjured reliance on federal law. Defendants removed the cases to the United States District Court for the Eastern and Southern Districts of Texas, alleging "artful pleading" of a federal claim or, alternatively, complete federal preemption. The Judicial Panel on Multidistrict Litigation transferred the cases to the Eastern District of New York.

On January 31, 1990, the *Ivy* plaintiffs petitioned this court for a writ of mandamus directing remand. On March 28, we denied the motion, ruling that the question of subject matter jurisdiction should be decided in the first instance by the district court. *In re Ivy* , 901 F.2d 7, 10 (2d Cir. 1990). Plaintiffs then moved in the district court for remand of both cases. The district court heard oral argument on March 6, 1991, and scheduled an additional hearing on the motion to remand and other motions for May 6, 1991, to allow for further briefing. In the interim, defendants moved to dismiss and to amend their notice of removal to assert federal officer removal pursuant to 28 U.S.C. § 1442(a)(1).

The district court remanded the claims of two civilian plaintiffs alleging injury, holding that they were not within the

Agent Orange I class and that federal officer removal was inapplicable. *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934 (E.D.N.Y. 1992). The court denied the motion to remand of the veteran plaintiffs and their family members and dismissed their claims as barred by the *Agent Orange I* settlement and the court's order enjoining future suits by class members. 781 F.Supp. 902, 918-20. Plaintiffs moved for reconsideration of the latter decision and for disqualification of Judge Weinstein pursuant to 28 U.S.C. § 455. The court, in an unpublished order, denied both motions and kept its original decision substantially intact.

FEDERAL JURISDICTION

As a general rule, a state case may be removed to federal court only if federal jurisdiction is evident on the face of the plaintiff's well-pleaded complaint. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). This rule is not satisfied with respect to the complaints herein. There is no complete diversity of citizenship, and no federal issue is apparent in the complaints. Indeed, the complaints explicitly disclaim reliance on federal law. Accordingly, in order to be removable, the *Ivy* and *Hartman* cases must fall within an exception to the "well-pleaded complaint" rule. The district court asserted two such exceptions -- plaintiffs' "artful pleading" of a federal question, and the court's residual authority under the All Writs Act to preserve its jurisdiction. We address these in order.

Ordinarily, a plaintiff is master of his complaint and may elect to proceed solely under state law even if federal remedies are available. *See Caterpillar*, *supra*, 482 U.S. at 392; *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, (1913). However, a complaint which appears to be grounded solely in state law actually may be federal in nature, and thus removable, if its true nature has been disguised by the plaintiff's artful pleading. *See generally* 14A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3722, at 266-75 (2d ed. 1985). Because state and federal laws have many overlapping or even identical remedies and because generally we respect a plaintiff's

choice between state and federal forums, this exception to the well-pleaded complaint rule is necessarily a narrow one.

The district court justified removal in the instant case on the authority of *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2, (1981), as interpreted by *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 760 (2d Cir.), *cert. denied*, 479 U.S. 885, (1986). Under *Sarkisian's* interpretation of *Moitie*, a state law claim is an artfully-pleaded federal claim if (1) the plaintiff previously had elected to proceed in federal court on a claim expressly grounded on federal law and (2) the elements of the subsequent state law claim are virtually identical to those of the claim previously made. *Id.* However, the instant case was not removable under the *Sarkisian* test, because the prior claim was not expressly grounded on federal law but instead was a diversity claim based on general tort law. The district court interpreted *Sarkisian* to require only that "the elements of the [subsequent] claim . . . be 'virtually identical' to those in the prior federal action," stating that "there is no indication that the Court of Appeals intended to . . . limit its reach" to those cases where the prior federal court action was based on federal question jurisdiction. 781 F.Supp. at 917. This was a misreading of *Sarkisian*, which explicitly requires that the prior claim be "expressly grounded on federal law." 794 F.2d at 760; *see also Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1414-17 (9th Cir. 1990).

Alternatively, the district court found authority for removal in its power under the All Writs Act to issue writs "necessary or appropriate" in aid of its jurisdiction. 28 U.S.C. § 1651. Here, the district court was on sounder ground. A district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case in order to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977).

If Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the *Agent Orange*

I settlement mechanism would be substantial. The parties to the settlement implicitly recognized this when they agreed that all future suits by class members would be permanently barred. It is difficult to conceive of any state court properly addressing a victim's tort claim without first deciding the scope of the *Agent Orange I* class action and settlement. The court best situated to make this determination is the court that approved the settlement and entered the judgment enforcing it. Removal in the instant case was an appropriate use of federal judicial power under 28 U.S.C. § 1651. *See United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863-64 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). In so holding, we are not unmindful of the fact that the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable. "Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Given the "exceptional circumstances" surrounding the instant case, issuance was a proper exercise of judicial discretion. The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.

Appellees contend that the instant case was removable pursuant to 28 U.S.C. § 1442(a), which in pertinent part allows removal of actions against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." Although appellees sought to amend their notice of removal to assert this as an additional basis for removal, the district court did not rule on their application to

amend. Because our decision is supported on other grounds, we too decline to reach this question.

Appellants' additional arguments against the district court's assumption of jurisdiction are not persuasive. They contend, for example, that removal in the instant case violates the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits a federal court from "grant[ing] an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." This contention is without merit. Assuming without deciding that removal of a case from state court to federal court is sufficiently akin to an injunction to come within the Act's ambit, the facts of the instant case bring it squarely within the above-mentioned exceptions to the Act. First, the district court's removal was "necessary in aid of its jurisdiction." Judge Weinstein has continuing jurisdiction over the *Agent Orange I* class action, not only to administer the settlement fund, *see* 818 F.2d at 184-86; 618 F.Supp. at 625, but also to ensure that the Settlement Agreement as a whole is enforced according to its terms. *See Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974). "In a class action, the district court has a duty to class members to see that any settlement it approves is completed, and not merely to approve a promise . . ." *In re Corrugated Container Antitrust Litig.*, 752 F.2d 137, 141 (5th Cir.), *cert. denied*, 473 U.S. 911 (1985). Second, removal was needed "to protect or effectuate" the district court's *Agent Orange I* judgment. This exception in the statute authorizes a federal court to proscribe state litigation of an issue that actually has been previously presented to and decided by the federal court. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). A review of the arguments, orders and judgment in *Agent Orange I* makes it crystal clear that the court in fact did determine the central issue of class membership raised here, i.e., that persons who had yet to manifest injury were class members. *See, e.g.*, Settlement Agreement ¶ 8, 597 F.Supp. at 865 ("The Class specifically includes persons who have not yet manifested injury.").

Appellants contend that *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, particularly *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987), require that the district court abstain from exercising jurisdiction in deference to the Texas state courts. This argument stands the *Younger* doctrine on its head. *Younger* teaches us to recognize the interest of the states in protecting the authority of their judicial system so that their orders and judgments are not rendered nugatory. *Pennzoil, supra*, 481 U.S. at 14 n.12 (quoting *Juidice v. Vail*, 430 U.S. 327, 336 (1977)). The application of *Younger*, as advocated by appellants, would threaten the authority of the federal judicial system and potentially nullify the federal courts' orders and judgments. This result is not the sort of federal-state comity envisioned in *Younger* and *Pennzoil*. *See Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n.8 (1977).

Appellants also assert that the district court did not have personal jurisdiction over them. This argument is frivolous. *See* 818 F.2d at 163. Likewise, there is no merit in their argument that removal in these cases interferes with their right to collaterally attack the *Agent Orange I* judgment by denying them the forum of their choice. Although appellants' attack is founded on their constitutional right to due process, nothing in the Constitution or in our jurisprudence demands that class members have an unchallengeable choice of forums in which to launch it. While the law as a general rule permits a plaintiff to choose his forum, that freedom is not absolute, as the removal, venue and multidistrict litigation statutes and the personal jurisdiction and *forum non conveniens* doctrines all demonstrate. It is obvious, from what presently is occurring herein, that the removal and multidistrict transfer in the instant case have not impinged unduly upon appellants' right of collateral attack.

CLASS MEMBERSHIP

Having resolved the preliminary jurisdictional questions, we turn to the central question of appellants' membership *vel non* in the *Agent Orange I* class. The answer to this question lies in the

meaning of the phrase "who were injured while in or near Vietnam from exposure to Agent Orange." Appellants contend that persons are not "injured" until medical symptoms become manifest. Appellees argue in response that injury occurs when a deleterious substance enters a person's body, even though its adverse effects are not immediately apparent. In the instant case, appellees' definition is correct.

The words "injury" and "injured" appear to have received the attention of courts and legislatures most often where limitation periods for suit are involved. For example, some authorities hold that the prescribed limitation period begins to run when one's personal physical rights are invaded; others hold that the limitation period does not begin to run until the hurt or damage resulting from the invasion is discovered. Absent a specific statutory mandate to the contrary, the definition of "injury" and "injured" generally remains the same regardless of which limitation period is applied; i.e., the limitation runs either from the time the "injury" occurs or the time the damage resulting from the "injury" is discovered. In the strict legal sense "'[i]njury' means a wrongful invasion of legal rights, and is not concerned with the hurt or damage resulting from such invasion . . . ." 43A C.J.S. *Injury* at 767; *see also Restatement (Second) of Torts* § 7.

In this respect, reference to the history of New York State's limitation period governing suits for personal injuries is illuminating. The traditional rule in New York is that the injury occurs and the limitation period begins to run when there is a wrongful invasion of one's personal rights, not when the damage allegedly resulting from the invasion is discovered. *See Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 300 (1936); *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 781 (1979)(mem.).

Recognizing the possible adverse effect this traditional rule might have on veterans claiming injury from Agent Orange, the New York Legislature, in 1981, decided that such claims "should not be prohibited by the holding that a cause of action accrues, and the statute of limitations commences to run from the

'date of injury.' " *See Legislative Findings: Victims of Herbicide Agents*, Section 1 of L. 1981, c. 266, *eff.* June 16, 1981, *reprinted in* footnote to N.Y. Civ. Prac. L. & R. § 214-b (McKinney 1990). The Legislature therefore provided in section 214-b that a veteran's action to recover damages for "personal injury" caused by contact with or exposure to Agent Orange "while serving" in Indo-China between 1962 and 1975 may be commenced within two years from the date of discovery of "such injury." This enactment changed the onset of the limitation period; it did not change the meaning of the word "injury."

From the very outset of the litigation in *Agent Orange I*, the plaintiffs adopted this meaning and urged it repeatedly upon the district court. The initial class action complaint alleged that the action was brought on behalf of, among others, "those individual veterans manifesting no symptoms of illness and disease at present, but at risk of genetic and somatic damage." In response to the defendants' motion to dismiss the "at risk" claims, plaintiffs argued in both the district court and this court:

> The "injury" in the Agent Orange cases has already occurred. The plaintiffs "at risk" have already been exposed to the toxic substance.
>
> * * *
>
> The at risk argument of the Defendant war contractors obscures the fact that every individual Plaintiff has been injured in fact . . . We have asked the Court to recognize that there is injury, in fact.
>
> * * *
>
> Judge, at the risk of delivering a short lecture on the medicine in this case, the exposure to the toxicant produced a physiological event, an injury within the meaning of the word "injury" in the technical law of torts.

The district court was fully aware of the New York Legislature's use of the term "personal injury" in section 214-b and its legislative preamble. *See* 597 F.Supp. at 810-11. In response to plaintiffs' urging, it adopted and approved similar usage in the Settlement Agreement and the judgment that incorporated it. *See id.* at 879, 870. There thus can be no question concerning the district court's intent or that of the parties to the Settlement Agreement. "At risk" veterans, i.e., victims with no visible symptoms, were included in the plaintiff class.

In our prior opinion affirming the class settlement, 818 F.2d 145, we recognized the propriety of this inclusion, because the military contractor defense was common to all of the plaintiffs' cases and, if successfully interposed, "would have precluded recovery by all plaintiffs, irrespective of the strengths, weaknesses, or idiosyncracies of their claims." *Id.* at 167. Appellants' arguments against class membership are no stronger now than they were when made in 1987.

Appellants' contention that they could not have been within the *Agent Orange I* class at the time of settlement because they did not have an "injury in fact," suggests a different meaning of that term than has been enunciated in numerous cases involving liability insurance coverage for injuries such as those sustained by appellants. Although the issue in the insurance cases is liability rather than jurisdiction, the controversy over the meaning of the term "injury in fact" is subject to judicial resolution in much the same manner as it is in the instant case. Thus, in *American Home Prods. Corp. v. Liberty Mutual Ins. Co.*, 748 F.2d 760 (2d Cir. 1984), we said that "[s]ome types of injury to the body occur prior to the appearance of any symptoms; thus, the manifestation of the injury may well occur after the injury itself." *Id.* at 764. We rejected the argument appellants now make that "injury in fact" means injury that is manifest, diagnosable or compensable. *Id.* at 764-65. *See also Aetna Casualty & Surety Co. v. Abbott Laboratories Inc.*, 636 F.Supp. 546, 548-49 (D. Conn. 1986).

In *Uniroyal, Inc. v. Home Ins. Co.*, 707 F.Supp. 1368 (E.D.N.Y. 1988), the issue before the court was whether Uniroyal was entitled to reimbursement from Home for Uniroyal's contribution to the *Agent Orange I* settlement. Apropos of the issue now before us, Judge Weinstein wrote:

> In this case there can be no doubt when the injury must be deemed to have taken place. The parties stipulated that any injury from exposure to Agent Orange took place "at or shortly after a serviceman's exposure to Agent Orange spraying."
>
> The force of the Olson Affidavit and the stipulation is to determine, for the purposes of this insurance litigation, that injury in fact took place within a week or so of spraying.

Id. at 1389. Although this decision is not binding in the instant case, its conclusion that plaintiffs sustained an "injury in fact" is eminently correct. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978).

Appellants' argument that they could not have been members of the *Agent Orange I* class because their claims did not satisfy the $10,000 amount-in-controversy requirement of 28 U.S.C. § 1332 as it then existed, was rejected by this court on the original *Agent Orange I* appeal, 818 F.2d at 163. We there said, quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938):

> [U]nless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

We followed the same reasoning in *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 734 (2d Cir. 1992), despite the fact that the amount-in-controversy requirement had been raised by then to $50,000. Further repetition of this rule is unnecessary.

We are satisfied that appellants' *Agent Orange I* claims, made in good faith, satisfied the monetary jurisdiction requirements.

Appellants next contend that they are not bound by the *Agent Orange I* class action and settlement because the court did not have personal jurisdiction over them. We rejected this argument on the appeal in *Agent Orange I*, 818 F.2d at 163. We there quoted the Judicial Panel on Multidistrict Litigation to the effect that transfers under 28 U.S.C. § 1407, the multidistrict litigation statute, "are simply not encumbered by considerations of in personam jurisdiction and venue" and that the transferee judge has all the pretrial jurisdiction the transferor judge would have had if the transfer had not occurred. We then proceeded in that opinion to discuss the adequacy of notice of the class action and proposed settlement, *id.* at 167-70, and held that the notices were adequate. Our view has not changed.

Appellants contend, as did appellants in *Agent Orange I*, that all class members did not receive adequate notice of their membership in the *Agent Orange I* action and the opportunity to exclude themselves therefrom. This, appellants allege, was a due process violation under the standards of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Appellants misapprehend the reach of *Shutts*. The Court's decision in that case "is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments," and "intimates no view concerning other types of class actions." *Id.* at 811 n.3. As such, "*Shutts* does not apply directly to classes of unknown plaintiffs." *See* 1 *Newberg on Class Actions* § 1.23, at 1-54 (3d ed. 1992). We distinguished *Shutts* in *Agent Orange I*, pointing out that here "there was no easily accessible list of veterans, as there must have been of royalty holders in [*Shutts*]." 818 F.2d at 169.

We again decline to extend the *Shutts* holding into situations such as this. "Due process, the courts have often declared, 'is a flexible concept,' intended to ensure 'fundamental fairness.'" *In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.) (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305,

320 (1985) and *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)), *cert. denied*, 493 U.S. 959 (1989). What process is due in a given instance requires the balancing of a variety of interests. In some cases, "the marginal gains from affording an additional procedural safeguard . . . may be outweighed by the societal cost of providing such a safeguard." *Walters*, *supra*, 473 U.S. at 320-21.

In the instant case, society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. As appellants correctly note, providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good. Their rights are better served, we think, by requiring that "fair and just recovery procedures be[] made available to these claimants," 1 *Newberg*, *supra*, § 1.23, at 1-56, and by ensuring that they receive vigorous and faithful vicarious representation.

It is axiomatic that a class action binds absent members only so long as they were adequately represented therein. *See generally Hansberry v. Lee*, 311 U.S. 32, 41 (1940). Our decision in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), describes the requisites of adequate representation as follows:

> [A]n essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class.

Id. at 562. Appellants do not challenge the qualifications of the *Agent Orange I* class counsel. Moreover, their conflict-of-interest claims are unpersuasive. Although, as the district court noted, "[o]ne can imagine many genuine conflicts of interest" in a situation such as this, the court concluded that any potential

conflicts that might have infected *Agent Orange I* never materialized:

> In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund. The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.

781 F.Supp. at 919.

We agree with the district court that designation of a subclass of future claimants and appointment of a guardian to represent their interests was unnecessary "because of the way [the settlement] was structured to cover future claimants." *Id.* As Judge Weinstein noted in one of the fairness hearings that he conducted:

> to appoint another attorney to represent that sub-group would just, in my opinion, increase the amount of legal fees, which is what all of us want to keep to a bare minimum. There are lots of arguments and classes and sub-classes, but if we appoint attorneys and guardians ad litem for everybody who might have . . . somewhat of a conflict of interest, there is hardly going to be any money left for the veteran.

Appellants' blanket allegation that the *Agent Orange I* settlement was collusive is patently frivolous. When appellants' counsel was pressed at oral argument to indicate some factual support for the allegation, he was unable to do so. Indeed, when one reads contemporaneous accounts of the settlement negotiations, which we described as having been "dramatically arrived at just before dawn on the day of trial after sleepless hours of bargaining," 818 F.2d at 166, it is impossible to envision any collusion between plaintiffs and defendants. By all accounts, the

negotiations were arm's-length and adversarial, even fierce. *See generally* Peter H. Schuck, *Agent Orange on Trial* 143-67 (1986); Francis J. Flaherty & David Lauter, "Inside Agent Orange: The 11th-Hour Talks that Almost Failed," *Nat'l L.J.*, May 21, 1984, at 1; Ralph Blumenthal, "How Judge Helped Shape Agent Orange Pact," *N.Y. Times*, May 11, 1984, § A at 1.

Appellants mistakenly attempt to create an inference of impropriety out of our characterization of the $180 million settlement as "essentially a settlement at nuisance value." 818 F.2d at 171. Assuming the correctness of our characterization, it is in no way indicative of any improper collaboration between class representatives and the chemical company defendants. It was instead a reflection of the "formidable hurdles" plaintiffs faced. As we went on to conclude, plaintiffs' counsel "had good reason to view this case as having only nuisance value." *Id.*

Indeed, we note that, despite some intervening changes in the law, serious obstacles to recovery remain. Thus, although the scope of the government contract defense has been somewhat limited by the Supreme Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), under proper circumstances the defense is still available to government contractors. *See Lewis v. Babcock Indus., Inc.*, 985 F.2d 83 (2d Cir. 1993); *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir.), *cert. denied*, 112 S.Ct. 584 (1991); *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990). There is more than a mere possibility that such circumstances exist in the instant case. It is clear from the chemical companies' contracts with the Government that the Government specified Agent Orange's ingredients in great detail. There also is documentary evidence tending to show that the Government strictly prescribed the markings on Agent Orange barrels, and prohibited all extraneous label information, including warnings. Finally, there is evidence that the Government's knowledge of the hazards of Agent Orange and dioxin was at least as great as that of the chemical companies, making it unlikely that there were "dangers . . . that were known to the supplier but not to the United States," of

which the suppliers should have warned. Boyle, *supra*, 487 U.S. at 512. In sum, although the availability of the government contract defense might not be a foregone conclusion, there is a reasonable probability that it would apply, barring any recovery by the plaintiffs.

In addition, despite continuing research, the crucial issue of "general causation," i.e., whether any injuries are attributable to Agent Orange, remains unsettled. As one 1992 commentator noted, reviewing the scientific literature: "To date, there has been no conclusive evidence that exposure to Agent Orange is carcinogenic, mutagenic or teratogenic in humans. Furthermore, no deaths attributable solely to exposure to Agent Orange and its dioxin contaminant have been reported." 13B Arthur L. Frank, *Courtroom Medicine: Cancer*, § 25A.00, at 25A-4 (1992).

Indeed, it remains as difficult as ever to prove individual levels of exposure to Agent Orange. For instance, a 1990 study conducted under the auspices of the Environmental Protection Agency and the Veterans Administration compared Vietnam veterans to veterans not serving in Vietnam and civilian men, all of like age, and concluded that:

> with or without adjustment for several demographic variables, the mean level of [dioxin] in the adipose tissue of the 36 Vietnam veterans was not significantly different from that of the 79 non-Vietnam veterans or the 80 civilian men. . . . Furthermore, the results showed no association between [dioxin] levels and any estimate of Agent Orange exposure opportunity based on military records. . . . The study results suggest that heavy exposure to [dioxin] for most Vietnam veterans was unlikely and that available military unit records used in the study were inadequate in assessing exposure to Agent Orange for those Vietnam veterans.

Han K. Kang *et al.*, *Dioxins and Dibenzofurans in Adipose Tissue of U.S. Vietnam Veterans and Controls*, at x (1990).

Even if appellants were to surmount the military contractor defense, provide satisfactory epidemiological evidence on the issue of general causation, and demonstrate with sufficient accuracy their levels of personal exposure to Agent Orange, they still would face the difficult task of demonstrating individual causation, i.e., that Agent Orange exposure caused the particular illnesses upon which they base their claims. Unlike asbestos, dioxin has not been recognized as the source of a distinctive medical illness.

The lesson to be drawn from this discussion is that the fundamental fairness of the *Agent Orange I* settlement remains unshaken. Notwithstanding the legal and scientific developments of the past nine years, the chances of recovery are nearly as speculative today as they were at the time of settlement. Appellants' challenges to the adequacy of their representation therefore must be rejected.

In so holding, we do not denigrate the importance of qualified and faithful class representation. The quality and fidelity of counsel are of paramount importance in class actions such as the instant one which involve unknown claimants. Indeed, we ordinarily would anticipate the appointment of a guardian to represent the interests of absent claimants, particularly those with questionable injuries. In the instant case, however, we are not writing on a clean slate. The unique circumstances surrounding *Agent Orange I* — in particular, the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement and the dim prospects of success both then and now — rendered additional protections unnecessary. The representation in *Agent Orange I* was more than adequate to protect appellants' interests.

Once all of the foregoing issues are resolved in favor of appellees, resolution of the case is relatively straightforward. Both the Settlement Agreement, and the district court's judgment dismissing the cases, explicitly and permanently barred future actions by class members against the defendants:

> All complaints in this class action, and all claims of each and every plaintiff and member of the Rule 23(b)(3) class, are hereby dismissed on the merits, with prejudice . . . .
>
> . . . .
>
> Each and every plaintiff and member of the Rule 23(b)(3) class is hereby forever barred from instituting or maintaining any action against any of the defendants . . . arising out of or relating to, or in the future arising out of or relating to, the subject matter of any of the complaints in this class action.

618 F.Supp. at 624.

> Defendants . . . are not, and in the future shall not be, subject to liability or expense of any kind to any member of the Class in respect of any claim arising out of the subject matter of the Complaint. . . . Claims against the Fund shall be the exclusive remedy of all Class members against the defendants . . . and all members of the Class are forever barred from instituting or maintaining any action against any of the defendants . . . arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint.

Settlement Agreement ¶ 5, 597 F.Supp. at 864. Because appellants are properly within the *Agent Orange I* class, these provisions are binding on them, and their suits were properly dismissed. The *Agent Orange I* settlement mechanism constitutes appellants' sole source of relief.

We are not persuaded by appellants' argument that the $10 million indemnity provision for state law judgments evidences a different intent. When the Settlement Agreement is read in its entirety, it is apparent that the indemnity provision was intended to protect the defendants against claims by those plaintiffs who opted out of the class and could sue separately in state court.

Appellants' final argument, raised for the first time after the court's initial decision below, is that Judge Weinstein should have disqualified himself for conflict of interest or appearance of partiality. Appellants contend that Judge Weinstein is a "fiduciary" of AOCAP, and thus has a conflict of interest requiring disqualification under 28 U.S.C. § 455(b)(4). In relevant part, section 455(b)(4) requires a judge to disqualify himself if "he knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." The statute defines "fiduciary" as including "such relationships as executor, administrator, trustee, and guardian." 28 U.S.C. § 455(d)(3).

As principal support for their claim, appellants rely on *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). In *Liljeberg*, the court held that disqualification was required because the trial judge was trustee of a college that stood to reap significant financial gains depending upon the outcome of the lawsuit. Appellants read *Liljeberg* too broadly. Although there are superficial similarities between *Liljeberg* and the instant case, there is one crucial difference. The fiduciary duty of the judge in *Liljeberg* was owed to a non-litigating entity, while Judge Weinstein's duty was part of his judicial obligation to litigating class members. A judge in a class action is obligated to protect the interests of absent class members. *See Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987). Moreover, we specifically instructed Judge Weinstein to retain direct oversight of the Class Assistance Program fund. *See* 818 F.2d at 185-86. His legally-imposed duties *qua* judge with regard to the settlement funds are not a "fiduciary" obligation within the meaning of section 455(b)(4), and do not mandate disqualification from cases which may involve the fund. *See Commissioner v. Brown*, 380 U.S. 563, 571 (1965) ("[T]he courts, in interpreting a statute, have some 'scope for adopting a restricted . . . meaning of its words where acceptance of [a literal] meaning would lead to absurd results . . . .'" (quoting *Helvering v. Hammel*, 311 U.S. 504, 510 (1941)).

In addition to basing their argument on section 455(b)(4), appellants allege that Judge Weinstein's "fiduciary" obligation violates section 455(a), which requires disqualification whenever a judge's "impartiality might reasonably be questioned." This argument likewise lacks merit. Whether a judge has an appearance of partiality is determined from the viewpoint of a reasonable observer with knowledge of all surrounding circumstances. *Liljeberg*, *supra*, 486 U.S. at 860-61. In the instant case, a reasonable observer would not question the district court's impartiality. In managing AOCAP, Judge Weinstein is merely carrying out the supervisory duties assigned to him by the law of class actions in general, and by the orders of this court in particular.

Alternatively, appellants argue that Judge Weinstein has manifested an appearance of partiality mandating his disqualification under 28 U.S.C. § 455(a) based on his conduct in other cases. In essence, appellants accuse Judge Weinstein of possessing some traits of megalomania, of having a "systemic interest in retaining excessive judicial powers over mass tort cases," Br. at 49, in order to effect a "systematic denial of rights to toxic tort plaintiffs," Br. at 58, to "circumvent" various legal obstacles, Br. at 61, and to ensure that "other defendants . . . make settlements by which enormous sums will be turned over to the custody of the court for discretionary allocation," Br. at 57. These allegations, verging on the slanderous, are patently ridiculous and an affront to both the district court and this court. Appellants overlook the fact that we affirmed in all significant respects Judge Weinstein's purported use of "excessive judicial powers" in *Agent Orange I*. Moreover, we recently commended Judge Weinstein for his "innovations" and "innovative managerial skills" in such large-scale litigation. *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 836 n.1 (2d Cir. 1992).

Even if appellants' section 455 arguments had some indicia of merit, they were not raised in a timely fashion. "It is well-settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining

knowledge of facts demonstrating the basis for such a claim." *Apple v. Jewish Hosp. & Medical Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987). Apparently recognizing the problem created by their delay, appellants contend on appeal that Judge Weinstein's lack of qualifications were hidden until revealed by his decision now being appealed. That argument is ridiculous. Judge Weinstein's highly-visible role in managing the *Agent Orange I* settlement and his active participation in other mass tort actions have been disclosed and discussed time and again in the media and in publicly-available documents and cannot have come as a surprise to appellants. *See, e.g.*, Arnold H. Lubasch, "Jack Weinstein: Creative U.S. Judge Who Disdains Robe and High Bench," *N.Y. Times*, May 28, 1991, at B5; Francis J. Flaherty & David Lauter, "Judge's Novel Rulings Spurred Settlement," *Nat'l L.J.*, May 21, 1984, at 41; Ralph Blumenthal, "How Judge Helped Shape Agent Orange Pact," *N.Y. Times*, May 11, 1984, at A1.

In conclusion we summarize our holdings as follows: (1) the removal and transfer of these cases from Texas state court to the United States District Court for the Eastern District of New York was a proper exercise of federal judicial power under the All Writs Act, 28 U.S.C. § 1651, and the multidistrict litigation statute, 28 U.S.C. § 1407; (2) appellants are properly within the class certified in *Agent Orange I*; (3) as members of the *Agent Orange I* class, appellants are barred by the *Agent Orange I* judgment from instituting and maintaining the instant litigation, and the district court properly dismissed their claims; (4) Judge Weinstein's disqualification is not required.

The judgment of the district court is affirmed, and costs are awarded to appellees.

APPENDIX B

UNITED STATES DISTRICT COURT
For the Eastern District of New York

Nos. 79 Civ. 747, No. 89 Civ. 3361,
90 Civ. 3928, and MDL No. 381

MICHAEL F. RYAN, *et al.*,

Plaintiffs,

v.

DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, T H AGRICULTURE & NUTRITION COMPANY, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL INC., and THOMPSON CHEMICALS CORPORATION,

Defendants.

In re "AGENT ORANGE" Product Liability Litigation;

SHIRLEY IVY, *et al.*,

Plaintiffs,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Defendants.

RONALD L. HARTMAN, *et al.*,

Plaintiffs,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Defendants.

OCTOBER 4, 1991

JUDGE: Jack B. Weinstein, United States District Judge.

WEINSTEIN, District Judge:

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Plaintiffs consist of two groups: first, those veterans and family members within the class covered by the *Agent Orange* class action pending in this court, and second, civilians claiming

injury from Agent Orange who were never members of the class. Defendants are the same as those in the class action.

The current suits began as state court actions in Texas. They were removed to the federal court in Texas and then transferred by the Multidistrict Panel to the Eastern District of New York. Plaintiffs now seek to remand their actions to Texas state court for lack of federal subject matter jurisdiction. Defendants move to dismiss plaintiffs' claims or for an injunction prohibiting plaintiffs from continuing their actions.

As explained in this memorandum, the plaintiffs who are members of the *Agent Orange* class must have their suits dismissed; they are free to share in the proceeds of the class action settlement to the extent they can demonstrate entitlement under the distribution plans being administered by the court. As it pertains to the civilian plaintiffs — who are not members of the class — the plaintiffs' motion to remand raises issues concerning the scope of 28 U.S.C. § 1442(a)(1) that require further consideration. These issues will be addressed in a separate memorandum.

I. INTRODUCTION

A. *Agent Orange Litigation: 1979-1984*

The current controversy is part of a continuing litigation whose first phase ended in settlement after six years of effort by scores of lawyers and many court officers -- special masters, magistrates, and judges. Among the hundreds of published and unpublished decisions, *see In re "Agent Orange" Prod. Liab. Litig.*, 475 F.Supp. 928 (E.D.N.Y. 1979) (dismissing federal constitutional and statutory claims, reserving possible federal common law claims, denying motion to limit communications to third parties); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 737 (E.D.N.Y. 1979) (finding subject matter jurisdiction on basis of federal common law issues), *rev'd*, 635 F.2d 981 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128, 102 S.Ct. 980 (1981); *In re "Agent Orange" Prod. Liab. Litig.*, 28 Fed. R. Serv. 2d

(Callaghan) 993 (E.D.N.Y. 1980) (granting motion of terminally ill plaintiff to videotape his own deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 750 (E.D.N.Y. 1980) (ordering government to refrain from destruction of documents pursuant to internal procedure); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 753 (E.D.N.Y. 1980) (various orders concerning modification of complaint and answers); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 754 (E.D.N.Y. 1980) (ordering videotaped deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 756 (E.D.N.Y. 1980) (establishing agenda for status conference); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 757 (E.D.N.Y. 1980) (requiring plaintiffs to file individual notices to retain right to bring actions against federal government); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 762 (E.D.N.Y. 1980) (dismissing claims against government as third-party defendant, establishing case management plan, conditionally certifying Rule 23(b)(3) class, and denying defendants' motion for summary judgment); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 616 (E.D.N.Y. 1981) (establishing committee to review procedures for videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 618 (E.D.N.Y. 1981) (allowing motion to amend caption, denying motion to amend complaint, denying defendants' motion for summary judgment on "government contractor" defense); *In re "Agent Orange" Prod. Liab. Litig.*, 93 F.R.D. 514 (E.D.N.Y. 1982) (allowing defendant to proceed with scheduled destruction of documents); *In re "Agent Orange" Prod. Liab. Litig.*, 534 F.Supp. 1046 (E.D.N.Y. 1982) (denying reargument on dismissal of government as third-party defendant, denying interlocutory appeal, provisionally dismissing claims against non-manufacturer defendants, denying motion to form steering committee for plaintiffs' counsel, denying motion for decertification of class, deferring decision on statute of limitations issues, and establishing elements of government contractor defense); *In re "Agent Orange" Prod. Liab. Litig.*, 537 F.Supp. 977 (E.D.N.Y. 1982) (provisionally dismissing claims against non-manufacturer defendant); *In re "Agent Orange" Prod. Liab. Litig.*, 94 F.R.D. 173 (E.D.N.Y. 1982)

(appointing special master to supervise discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 544 F.Supp. 808 (E.D.N.Y. 1982) (denying motion to disqualify defense attorneys; provisionally dismissing claims against certain non-manufacturer defendants, and denying motion to implead suppliers); *In re "Agent Orange" Prod. Liab. Litig.*, 95 F.R.D. 191 (E.D.N.Y. 1982) (clarifying that denial of motion to implead suppliers was without prejudice); *In re "Agent Orange" Prod. Liab. Litig.*, 95 F.R.D. 192 (E.D.N.Y. 1982) (affirming special master's ruling as to location of depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 578 (E.D.N.Y. 1983) (adopting special master's protective order for discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582 (E.D.N.Y. 1983) (rejecting first amendment challenge to protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 587 (E.D.N.Y. 1983) (adopting with modifications special master's order regarding videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y. 1983) (adopting protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y. 1983) (adopting special master's protective order for Department of Agriculture documents); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427 (E.D.N.Y. 1983) (adopting special master's procedures for discovery of documents possibly subject to executive privilege); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 541 (E.D.N.Y. 1983) (denying interlocutory appeal of decision deferring certification of class and determination of appropriate notice); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 542 (E.D.N.Y. 1983) (affirming special master's denial of discovery request); *In re "Agent Orange" Prod. Liab. Litig.*, 565 F.Supp. 1263 (E.D.N.Y. 1983) (granting summary judgment for four defendants on government contractor defense; denying summary judgment for other defendants); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 522 (E.D.N.Y. 1983) (adopting order of special master concerning discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539 (E.D.N.Y. 1983) (adopting special master's order to unseal documents in connection with summary judgment motions); *In re*

"Agent Orange" Prod. Liab. Litig., 98 F.R.D. 554 (E.D.N.Y. 1983) (denying request for reconsideration of order to unseal documents); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 557 (E.D.N.Y. 1983) (ordering special master to review discovery decisions in light of court's decision to try causality and liability issues); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 558 (E.D.N.Y. 1983) (approving special master's order of additional discovery to clarify circumstances surrounding document destruction); *In re "Agent Orange" Prod. Liab. Litig.*, 570 F.Supp. 693 (E.D.N.Y. 1983) (clarifying program for discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 571 F.Supp. 481 (E.D.N.Y. 1983) (granting motion of law firm to be relieved as lead counsel for plaintiffs and appointing new plaintiffs' management committee); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 338 (E.D.N.Y. 1983) (approving discovery recommendations of special master); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 645 (E.D.N.Y. 1983) (lifting prior protective order applying to government documents obtained during discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y.) (certifying Rule 23(b)(3) and Rule 23(b)(1)(B) classes), *appeal denied*, 100 F.R.D. 735 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 778 (E.D.N.Y. 1984) (denying motion to implead suppliers of chemical components); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F.Supp. 690 (E.D.N.Y. 1984) (finding national consensus law on issues of liability, government contractor defense and punitive damages); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F.Supp. 1242 (E.D.N.Y.) (reinstating third-party plaintiffs' claim for indemnity against government with respect to claims of veterans' wives and children), *mandamus denied*, 733 F.2d 10 (2d Cir.), *appeal denied*, 745 F.2d 161 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *In re "Agent Orange" Prod. Liab. Litig.*, 101 F.R.D. 97 (E.D.N.Y. 1984) (ordering *in camera* disclosure of names of scientists deleted from government report); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740 (E.D.N.Y. 1984) (approving

settlement of class action subject to fairness hearings); *In re "Agent Orange" Prod. Liab. Litig.*, 603 F.Supp. 239 (E.D.N.Y. 1985) (dismissing claims of veterans' wives and children against government), *aff'd in part, vacated in part*, 818 F.2d 201 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985) (modifying protective orders); *In re "Agent Orange" Prod. Liab. Litig.*, 105 F.R.D. 577 (E.D.N.Y. 1985) (affirming with modification magistrate's order that defendants in two non-settled cases produce deponents); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1221 (E.D.N.Y. 1985) (dismissing defendants' claim for indemnity from government for settlement payments to veterans' families), *aff'd*, 818 F.2d 204 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1223 (E.D.N.Y. 1985) (ruling as to admissibility of opt-out plaintiffs' scientific evidence and expert testimony and granting summary judgment in favor of defendants for plaintiffs' failure to establish causation), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1267 (E.D.N.Y. 1985) (same), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1285 (E.D.N.Y. 1985) (dismissing action brought by Hawaiian civilians), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1290 (E.D.N.Y. 1985) (dismissing claim of civilian physician for failure to demonstrate exposure to herbicides), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1296 (E.D.N.Y. 1985) (determining class-action plaintiffs' attorney fees and reaffirming settlement); *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1396 (E.D.N.Y. 1985) (establishing plan for disbursement of settlement fund pending appeals), *aff'd in part, rev'd in part*, 818 F.2d 179 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1452 (E.D.N.Y. 1985) (denying motion to set aside attorney fee-sharing arrangement),

rev'd in part, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987); *In re "Agent Orange" Prod. Liab. Litig.*, 618 F.Supp. 623 (E.D.N.Y. 1985) (approving settlement of class action and dismissing with prejudice claims of class members); *In re "Agent Orange" Prod. Liab. Litig.*, 618 F.Supp. 625 (E.D.N.Y 1985) (approving plan for Australia and New Zealand); *In re "Agent Orange" Prod. Liab. Litig.*, 787 F.2d 822 (2d Cir. 1986) (dismissing claims of non-class plaintiffs against defendant not named in complaints); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14 (2d Cir. 1986) (denying motion to disqualify plaintiffs' attorneys from appealing settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 804 F.2d 19 (2d Cir. 1986) (denying repeal of stay on settlement funds pending appeal); *In re "Agent Orange" Prod. Liab. Litig.*, 689 F.Supp. 1250 (E.D.N.Y. 1988) (modifying class assistance program as required by 818 F.2d 179 and granting opt-out plaintiffs opportunity to opt into class for purposes of benefiting from settlement fund).

Narratives of these events are in print. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 148-61 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Nevertheless, a brief recapitulation of certain aspects of this history is desirable as background to the current phase of the *Agent Orange* litigation saga.

While in the service of their country, hundreds of thousands of military service personnel were exposed to the defoliant Agent Orange, which contained trace elements of dioxin. Lawsuits on behalf of veterans proliferated throughout the country starting in 1978. The suits — as much a demand for compensation as a political protest of the treatment of Vietnam veterans by the government and public at large — were brought against the various manufacturers of defoliants, who in turn impleaded the federal government. Between two and three million members of the armed forces who served in or near Vietnam as well as their families were potential plaintiffs.

In 1979, the Judicial Panel on Multidistrict Litigation transferred as MDL 381 over 600 cases involving about 15,000 plaintiffs to the Eastern District of New York for coordinated and consolidated pretrial proceedings. In the initial proceedings of MDL-381, the court denied defendants' motion to dismiss for lack of subject matter jurisdiction because the complaint raised questions of federal common law. *See* 506 F.Supp. at 737. When the Second Circuit Court of Appeals reversed this ruling, *see In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981), the litigation became a suit predicated on diversity jurisdiction.

In December of 1980, the court granted the federal government's motion to be dismissed as a third-party defendant on the basis of sovereign immunity. 506 F.Supp. at 762. It also denied plaintiffs' motion to create a "limited fund" class action under Federal Rule of Civil Procedure 23(b)(1)(B), and instead indicated that it planned to certify a "common question" class under Rule 23(b)(3). *Id.* In addition, the court denied the defendants' motion to dismiss on the ground that the production of defoliants was ordered by, and met the specifications of, the federal government (the "military contractor defense"). The court indicated the defendants could later attempt to prove the applicability of the defense. *Id.* Following discovery, the court granted, but did not enter, summary judgment on the military contractor defense for some but not all defendants. 565 F.Supp. at 1263.

In December of 1983, the court certified two classes of plaintiffs and scheduled a trial to commence in May of 1984. A Rule 23(b)(3) class with opt-out rights was created to try the fundamental common question of the causal relationship between dioxin and plaintiffs' injuries. 100 F.R.D. at 718. In addition, a Rule 23(b)(1)(B) limited fund class without opt-out rights was created to cover plaintiffs' punitive damage claims. *Id.* The 23(b)(3) class was defined as

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from

> 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . . The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 729. Pursuant to Rule 23(c)(2), the court ordered plaintiffs' counsel to notify class members by mail where possible, and by radio, television, magazine, and newspaper announcements throughout this country, Australia, and New Zealand. The mailings and announcements informed class members that they would be bound by the class action unless they forwarded a written request for exclusion to the clerk of the court by May 1, 1984. *Id.* at 732. Fewer than 2,500 servicepersons filed opt-out requests. *See* 597 F.Supp. at 756.

B. *The Settlement Agreement*

On May 7, 1984, a tentative settlement was forged. According to its terms, the defendants agreed to pay the class $180 million in final settlement of all claims arising out of exposure to *Agent Orange* then or in the future. Concerned with the potential for new actions and recognizing the need for finality, the Settlement Agreement expressly stated that "[t]he class specifically includes persons who have not yet manifested injury." 597 F.Supp. at 865.

The Settlement Agreement provided that the $180 million be paid into a Settlement Fund to be established, maintained, and administered by the court. The agreement also required the court to retain jurisdiction over the Settlement Fund pending its final disposition. *Id.* at 866. The exclusive remedy provided for all class members was a claim against the Settlement Fund. Under the Settlement Agreement, class members were forever barred from instituting or maintaining any action against defendants arising out of or relating to, or in the future arising out of or relating to, exposure to Agent Orange. The Settlement set aside

$10 million of the $180 million to indemnify the defendants from any judgments obtained in state court actions by members of the class alleging harm caused by exposure to Agent Orange in or near Vietnam. Any part of the indemnity fund not used reverts to the benefit of the class members.

The Settlement Agreement was preliminarily approved on January 7, 1985. *See id.* at 862. Notice of the proposed settlement was given to the class. Following eleven days of fairness hearings in five cities, the court granted final approval of the Settlement Agreement on June 18, 1985. 611 F.Supp. at 1347. Subsequently, the court issued an Order and Final Judgment of Dismissal which: (1) dismissed with prejudice all claims by class members; (2) barred all class members from instituting or maintaining any action against defendants arising out of the subject matter of the class action; and (3) retained the court's jurisdiction over the class action for the purpose of maintaining, administering, and distributing the Settlement Fund. *See* 618 F.Supp. at 624.

C. *Dismissal of Opt-Out Claims*

After the court preliminarily approved the Settlement Agreement, most of the original 2,500 opt-outs chose to opt back into the class. Two hundred and eighty-two servicepersons did not. *See* 611 F.Supp. at 1230. Their claims were embodied in seventeen different cases.

Summary judgment was granted against each opt-out plaintiff on the grounds, *inter alia*, that none could prove by the probability demanded in tort litigation that his or her ailment was caused by Agent Orange, *see* 611 F.Supp. at 1260-63; 611 F.Supp. at 1284-85, and that all the claims were barred by the military contractor defense. *See* 611 F.Supp. at 1263-64; 611 F.Supp. at 1285.

D. *Appeals*

Various district court rulings including the final judgment were appealed to the Court of Appeals for the Second Circuit.

The rulings included orders certifying the class action, approving the Settlement Agreement, outlining the distribution plan, awarding counsel fees, granting summary judgment against the opt-out claimants, dismissing untimely claims, and dismissing all claims of class members who objected to the Settlement Agreement. Specifically assigned as errors were the inclusion in the class definition of persons with latent or "after-manifesting" injuries, the sufficiency of the notices of class certification and settlement of the action, the adequacy of the Settlement Fund, and the propriety of the distribution plan.

In nine unanimous opinions dated April 21, 1987, the Court of Appeals disposed of all of the numerous individual appeals except those from the order of the district court providing for public access to documents sealed from public view during discovery. Petitions for rehearing were denied. The Court of Appeals approved the settlement and multiple petitions to the United States Supreme Court were denied.

Specifically, the Court of Appeals affirmed the adequacy of notice, the adequacy of the representation given the absent class members, the fairness of the settlement, and the dismissal of the opt-out plaintiffs' claims. *See* 818 F.2d 145 (affirming class certification, adequacy of notice to class, and approving settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987) (approving Veteran Payment Program but rejecting Class Assistance Program as an organization operated independently of the court); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (2d Cir. 1987) (affirming summary judgment against opt-out plaintiffs), *cert. denied*, 487 U.S. 1234 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194 (2d Cir. 1987) (affirming dismissal of Federal Tort Claims Act claims of servicepersons and their relatives); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 201 (2d Cir. 1987) (affirming dismissal of "direct" claims against the United States brought by wives and children of servicepersons), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204 (affirming dismissal of manufacturers' claim for indemnity against United States for settlement payments); *In re*

"Agent Orange" Prod. Liab. Litig., 818 F.2d 210 (2d Cir. 1987) (affirming dismissals of Hawaiian civilians' actions), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir.) (rejecting plaintiff class attorneys' fee-sharing agreement and reinstating in part fee award determination of district court), *cert. denied*, 484 U.S. 926 (1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226 (2d Cir. 1987) (affirming district court's calculations of attorney fees but reinstating certain fees against which district court had offset discovery costs).

II. OPERATION OF THE SETTLEMENT FUND

The court outlined its proposed plan for the use of the Settlement Fund in May of 1985. 611 F.Supp. at 1396. On July 5, 1988, the court announced the final plan for distribution. 689 F.Supp. at 1250. At that time, the fund had approximately $240 million in assets. Some $13 million was used for attorney fees. Five million dollars was set aside for the benefit of veterans from Australia and New Zealand. $170 million was allocated to the Agent Orange Veteran Payment Program designed to compensate disabled veterans and their survivors. The Payment Program compensates for the death or disability of any class member that occurs on or before December 31, 1994 or until the Plan's funds run out, whichever comes first.

Another $42 million was designated to the Agent Orange Class Assistance Program. It distributes funds in the form of grants to organizations that provide services to children with birth defects and their families and assistance to Vietnam veterans who are not otherwise able to obtain needed assistance. The $10 million indemnity fund will be added to the fund for the Class Assistance Program if it is not used for state litigation prior to 1994.

A. *Veteran Payment Program*

In light of the dismissal of the claims of the opt-out plaintiffs, the court ruled, as a matter of equity, that any person who

had opted out of the class action settlement was automatically eligible to participate in the Payment Program unless he or she "opted-out" a second time by January 1, 1989. *See* 689 F.Supp. at 1262. Initially, the court required a veteran or his or her survivor seeking compensation from the Payment Program to request an Application Kit within 120 days of learning of the death or injury or by January 1, 1989, whichever was later. The date was extended and then abolished altogether as a condition for sharing in the fund. All fully completed applications received prior to the termination of the Program will be considered timely. Berman, *The Agent Orange Veteran Payment Program*, 53 Law & Contemp. Probs. 49 (1990), provides an account of the basic operation of the Program.

As of September 30, 1991, the Payment Program has received applications from more than fifty thousand persons. Approximately 80% of these applications were filed by veterans seeking disability payments; the other 20% were filed by surviving family members. The following chart outlines the status of the applications:

Number approved and paid	26,727
Number denied	19,882
Number pending	1,967
Number inactive	5,191
Total	53,767

See Report of the Special Master on the Distribution of the Agent Orange Settlement Fund, Third Annual Report (October, 1991). As of September 30, 1991, a total of $86,255,351 had been disbursed to eligible applicants under the Payment Program.

About 80% of the claims submitted to the Payment Program are disability claims. Of these, 12,091 (roughly 28%) resulted from disabilities occurring after May 7, 1984 (the settlement date). 9,350 of those claims have been approved for payment. The remaining 20% of filed claims are for survivor payments. Of these, 6,350 (about 53%) are for deaths occurring after May 7,

1984. 4,242 of these claims have been approved. *See Third Annual Report, supra.*

Applicants who disagree with the disposition of their applications may file an appeal with the court-appointed Special Master for Appeals. As of September 19, 1991, 10,396 appeals had been filed and a total of 9,816 decisions had been rendered. Of the decisions on appeal, 6,890 affirmed the determination below and 2,926 overruled or modified the decision. For each case, the court's approval is required before the Special Master's determination becomes final.

In overseeing the Payment Program the court has received thousands of letters and telephone inquiries from veterans or their families. Many seek information about the processing of their claims; others request specific relief such as an advance payment because of hardship or necessity. The court responds to each inquiry by either contacting the disbursing agent for the Agent Orange Payment Program, the Special Master for Appeals, or, where appropriate, granting the requested relief. As mentioned above, the court has passed upon almost 10,000 appeals in individual cases. It receives frequent reports from the bodies administering the program and its financial advisors. All disbursements from investment funds are approved by the court. It is also in frequent contact with Special Master Kenneth Feinberg about such matters as the successful legislative and administrative decisions to exempt settlement funds from taxation and from liens of the Department of Veterans Affairs and others. The court has also consulted with the Advisory Board to the Payment Program, which is composed of veterans Albert S. Dandridge, III, Esq., Donna-Marie Boulay, Esq., Charles T. Hagel, Vincent Martin, and John McElrath.

B. *Class Assistance Program*

The Class Assistance Program provides services to large numbers of possibly exposed veterans and their families with special emphasis given to children with birth defects. The Program is administered by the court with the advice of

Executive Director Dennis K. Rhoades, Deputy Director Michael Leveck, and a board of unpaid Vietnam veteran advisors currently consisting of Rev. Robert Certain, Steven Champlin, Ronald Gardner, Charles T. Hagel, Mary Lou Keener, Gary E. May, Frank McCarthy, Hon. Matthew Railey, Dr. Oscar Salvatierra, and Solomon B. Watson, IV.

Continuing supervisory responsibility requires the court to review each of the proposed grants. The court also attends regular meetings with the Executive Director and advisory board. The Executive Director reports to, and requests advice and authority from, the court in specific matters in frequent phone and face-to-face consultations. The court also has physically inspected the operation of a number of the institutions funded by the program and meets with the leaders of many more of these organizations.

Since its inception, the Class Assistance Program has awarded 134 grants worth a total of almost $24 million. Of these grants, 71 are active, providing $13.5 million in services to veterans and their families in 46 states. *Third Annual Report of the Agent Orange Class Assistance Program* (October 3, 1991). Recipients include local and national Vietnam veterans' groups, agencies serving adults and children with disabilities, and agencies providing family counseling. *See* Appendix 1. The various programs in these areas provide services ranging from counseling and other direct assistance to help in obtaining services and benefits from government and private providers for which veterans and their families are eligible. *See* Appendix 2. All organizations that receive funds file quarterly reports and undergo annual evaluations both to assist them in achieving their goals and to ensure that grant money is being used effectively. The Class Assistance Program estimates that, in the last three years, grantee-organizations have served about 46,000 veterans and family members. *See* Appendix 3.

In the summer of 1991, students from Touro Law School, volunteers, and Program staff examined some 250,000 claims files of the court and obtained the names of about 75,000

birth-disabled children of Vietnam veterans who may have been exposed to Agent Orange. Their families will be contacted in an attempt to assist them with the network of social and medical agencies cooperating with the Class Assistance Program.

The staff of the Class Assistance Program, working with state bodies, veterans' groups, academic institutions, and national and local social service institutions, also conducts training programs. A major thrust of these programs is to educate agencies and workers in the helping professions on the needs of veterans as family members.

III. THE PRESENT ACTIONS

The two actions in which motions to remand are pending are, in effect, a direct challenge to the validity of the settlement and the programs now financed by the Settlement Fund. Those plaintiffs who are class members have now sued the same chemical companies who were defendants in the original *Agent Orange* litigation on the same grounds and for the same relief as was originally sought and compromised in the class action. If plaintiffs are successful, they will automatically reduce the sums available for other class members, since the terms of the settlement set aside $10 million for indemnification of the defendants against suits of this kind.

In starkest terms, the cases present the question of whether members of a class whose action was brought and is still pending in federal court can circumvent the effect of a federal judgment by bringing new actions in a state court relying exclusively on state law. The need to protect other class members, the importance of maintaining the class action as viable litigation device, and the interest of all litigants in the finality of settlements require that the question be answered in the negative.

A. *Hartman I*

In June 1988, *Hartman v. Diamond Shamrock Chemical Co.* (*Hartman I*) was commenced in Texas state court. The plaintiffs were Ronald Hartman and his wife and children. Mr. Hartman

is a Vietnam veteran who was diagnosed in 1988 as having non-Hodgkins lymphoma. His children, Jeffrey Alan Hartman and Angela Marie Hartman, both suffer from birth defects. Katherina Hartman, his wife, claims emotional injury arising out of her husband's and childrens' conditions.

The Hartman complaint was the same in all substantive respects as the class action complaint in *Agent Orange*. Plaintiffs sought compensatory and punitive damages on behalf of a class of veterans exposed to Agent Orange in Vietnam who allegedly manifested injuries after the May 7, 1984 settlement date or who discovered their injuries after that date. The defendants were the same chemical companies sued in the *Agent Orange* class action. The *Hartman I* action was filed by Benton Musslewhite, Esq., an attorney who participated in the representation of the *Agent Orange* class and signed the Settlement Agreement.

Hartman I was removed to the United States District Court for the Eastern District of Texas. The case was transferred to this court by the MDL panel on February 1, 1989. *See In re "Agent Orange" Prod. Liab. Litig.*, MDL-381 (J.P.M.D.L. Feb. 1, 1989) (unpublished order). At plaintiffs' request, this court dismissed the *Hartman I* action without prejudice on September 25, 1989.

B. *Ivy and Hartman II*

In May 1989, a group of 34 plaintiffs commenced *Ivy v. Diamond Shamrock Chemicals Co.* in Texas state court. Like the *Hartman I* plaintiffs, most of the plaintiffs in *Ivy* assert that they suffered injuries as a result of exposure to Agent Orange during service in the Armed Forces in Vietnam and that their injuries did not manifest themselves or were not discovered until after May 7, 1984. Charles Jardon, Gary Thomas, James Kent, Earl Thompson, James Donald Deloatch, and Emile Annibolli claim injury from exposure to Agent Orange during military service in Vietnam from 1963 to 1971. Family members include Shirley Ivy, Verda Wilson, Shirley Zalewaski, Dawn Marie Inman, Peggy Sands, Ursula Margot Parry, and Laura Jenkins, who

bring actions on behalf of themselves and the estates of deceased veterans Donald Ivy, Isaiah Wilson, Jr., Yen Zalewaski, Bobby Joe Inman, Martin Sands, James D. Parry, Sr., and Eddie Jenkins. Toni K. Jardon, Charles Jardon, Jr., Robin Jardon, Warren Jardon, Sharon Jardon, Mary Lee Thomas, Emma Kent, Judy L. Thompson, and Joyce Deloatch also sue as family members. All of these plaintiffs fall within the class as defined in the original *Agent Orange* litigation.

Two of the claimants in the *Ivy* action allege injuries from exposure to Agent Orange while acting in a civilian capacity. Charles Brown and Clarence White (whose estate is being represented by James White) served as civilian employees in Vietnam and claim to have been injured from exposure to *Agent Orange*. Since these civilian plaintiffs did not serve in a military capacity, they are not members of the class bound by the 1984 settlement and order.

There is some confusion as to representation of some of the *Ivy* plaintiffs. Robert Hager, Esq. only claims to represent Donald Ivy, Shirley Ivy, James Deloatch, and Joyce Deloatch. The other plaintiffs in the *Ivy* action are represented by counsel in Texas who did not appear in this court.

Shirley Ivy is attempting to be a class representative of a class of veterans and survivors who manifested or discovered injury after the May 7, 1984 opt-out deadline. Ronald Hartman is attempting to do the same in *Hartman II*.

James Deloatch, Joyce Deloatch, Tamara Deloatch, James L. Kent, Sr., Emma Kent, Charles E. Brown, Gary F. Thomas, and Mary Lou Thomas purported to opt out of the *Agent Orange* class by filing notices with the Clerk of the Court in August of 1988. Shirley Ivy also filed an opt-out notice on behalf of herself and her deceased husband, Donald Ivy, with the Clerk of the Court on August 25, 1991.

Some *Ivy* plaintiffs have availed themselves of the Veteran Payment Program. Shirley Zalewaski apparently filed a notice purporting to opt out of the class but later requested an

application for the Payment Program. In March 1989, Verda Wilson applied for a survivor payment from the Agent Orange Veteran Payment Program on behalf of her late husband, Isaiah Wilson, Jr. In September she was denied relief but that decision was overruled by the Special Master for Appeals. On January 15, 1991, the court approved payment to her of a survivor award. She received $3,400 in March of this year. In May 1990 Laura Jenkins also applied for survivor payments on behalf of her late husband, Eddie Jenkins. She was approved for payment and received $2,040 in February, 1991. Plaintiffs Ursula Margot Parry and Shirley Zalewaski have applied for payment from the Settlement Fund and have been sent application kits which they have not yet returned.

The *Ivy* complaint, which seeks compensatory and punitive damages for "after-manifested" injuries, expressly disclaims reliance on federal law. Defendants nevertheless removed the *Ivy* action to federal court on federal question grounds.

In April 1990, a second action was filed by the *Hartman I* plaintiffs in Texas state court. With one exception, the complaint in *Hartman II* is essentially identical to *Hartman I*; like the complaint in *Ivy*, it disavows reliance on any right or recovery under federal law. *Hartman II* was also removed to federal court. While the *Ivy* and *Hartman II* actions have not been consolidated, the plaintiffs in both actions will be referred to collectively as "plaintiffs."

In both the *Ivy* and *Hartman II* notices of removal, the defendants offered two grounds for federal subject matter jurisdiction. First, the court was said to have jurisdiction over this action "because most of the plaintiffs' claims have already been asserted and adjudicated in federal court and plaintiffs' petition is merely an artful pleading to avoid federal jurisdiction." Second, the court's jurisdiction was invoked "pursuant to 28 U.S.C. § 1331 based on the doctrine of complete federal preemption."

On January 31, 1990, the plaintiffs petitioned the United States Court of Appeals for the Second Circuit for a writ of

mandamus directing the MDL Panel to vacate the transfer order for lack of federal subject matter jurisdiction. The petition was denied on March 28, 1990. *See In re Ivy*, 901 F.2d 7 (2d Cir. 1990). The Court of Appeals directed that the issue of subject matter jurisdiction be considered in the first instance by the transferee court. *Id.*

In October 1990, plaintiffs moved in this court for an order remanding both actions to the Texas state courts on the ground that federal subject matter jurisdiction was lacking. In December 1990, defendants moved under the All-Writs Act, 28 U.S.C. § 1651, for an injunction prohibiting the plaintiffs, their attorneys and certain nonparties from prosecuting *Ivy* and *Hartman II* and from commencing any new actions compromised by the Settlement Agreement.

A second mandamus petition that sought to prevent this court from ruling on the merits of the case was denied without opinion in December 1990. *In re Ivy*, No. 90-3065 (2d Cir. Dec. 12, 1990). A third mandamus petition seeking relief similar to the second petition was denied in March of 1991. *In re Ivy*, No. 91-3011 (2d Cir. Mar. 5, 1991).

Oral argument on the motion to remand was heard on March 6, 1991. Given the complexity of the legal issues and the questions posed by the court, time for further briefing was requested by the defendants. The motion to remand and any additional dispositive motions were rescheduled to be heard on May 6, 1991.

Prior to the May 6 return date, defendants moved to dismiss plaintiffs' claims. Defendants further moved for leave to amend their notice of removal to add 28 U.S.C. § 1442(a)(1) (removal of cases involving federal officer or persons acting under such officer) as a basis for jurisdiction. Plaintiff Hartman moved for an order consolidating the *Ivy* and *Hartman II* actions for trial purposes.

On May 6, 1991 the court heard oral argument on the following motions:

1. Plaintiffs' motion to remand to the Texas state courts.

2. Defendants' motion under the All-Writs Act for an injunction prohibiting further state court litigation.

3. Defendants' motion to dismiss.

4. Defendants' motion for leave to amend the notice of removal to add an additional basis for jurisdiction.

At the hearing, the parties requested additional time for supplemental briefing. The court gave the plaintiffs until July 6, 1991 and the defendants thirty days from that date. No further argument was scheduled. Plaintiffs requested and received a two month adjournment to September 6. A further application for another 30 day extension was made by the plaintiff on August 28, 1991; it was denied in view of the desirability of a final decision.

Defendants most recently requested still more time to respond to plaintiffs' extensive scientific submissions. The court granted thirty days to both parties to supplement their scientific documentation. While the court believes the scientific contentions on both sides are irrelevant, and, if relevant, not dispositive, the parties desire to make a record for purposes of appeal. The court saw no reason to deny them that opportunity.

IV. LAW

A. *Subject Matter Jurisdiction*

The sole basis advanced to justify remand is the alleged lack of federal subject matter jurisdiction. Since diversity jurisdiction is lacking and the complaints disavow reliance on federal law, plaintiffs maintain that the cases belong in state court. With respect to all the plaintiffs who fall within the definition of the class in the *Agent Orange* litigation, this position is without merit. This court retained jurisdiction over the class action and has authority to ensure that its prior orders and the Settlement Agreement are enforced. If an independent basis for jurisdiction

were necessary, the complaint itself calls into question federal law by undermining a final federal class action judgment.

The two civilian plaintiffs in *Ivy* are, however, in a separate category. They are not members of the class and are therefore not bound by the Settlement Agreement. Their cases are severed from the claims of the remaining plaintiffs. The question of the court's jurisdiction over these plaintiffs will be addressed in a separate memorandum. For the remainder of this opinion, the term "plaintiffs" refers only to the veteran plaintiffs.

1. Adequacy of Notice of Removal

Defendants' removal was proper because the court retains jurisdiction over the Settlement Agreement and because it must enforce its bar on subsequent suits by class members against the defendants. In addition, plaintiffs' state law complaint is an artfully pleaded attempt to avoid a prior binding federal judgment. Defendants' removal notices in the *Ivy* and *Hartman II* expressly identify only the last of these grounds. Although the notice is somewhat less clear than it might have been as to the other bases of subject matter jurisdiction, this court is charged with the duty, consistent with the general rules of notice pleading, to construe removal notices, like all pleadings, liberally and in accord with substantial justice. *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966); *Harlem River Produce Co. v. Aetna Cas. & Sur. Co.*, 257 F.Supp. 160, 163-64 (S.D.N.Y. 1965); *cf. Curley v. Brignoli, Curley & Roberts Ass'ns*, 915 F.2d 81, 85 (2d Cir. 1990) (court will look beyond face of complaint to establish diversity jurisdiction), *cert. denied*, 111 S.Ct. 1430 (1991). Jurisdiction on grounds not explicitly stated in the notice of removal is appropriate where the grounds are implicit in the situation. *See Walker v. Gibson*, 604 F.Supp. 916, 919 (N.D. Ill. 1985); *Harper v. National Flood Insurs. Ass'n*, 494 F.Supp. 234, 236 (M.D. Pa. 1980).

Defendants' notice properly stated one adequate ground for removal: plaintiffs' artful pleading to avoid a final federal judgment. Defendants' claims that plaintiffs' actions are

removable under the doctrine of federal preemption and have already been asserted in federal court in a pending federal action, taken in context, support the additional grounds discussed below.

2. Court's Retained Jurisdiction

Plaintiffs are members of the *Agent Orange* class. The veterans all served in Vietnam between 1961 and 1972 and claim injuries from exposure to the herbicide. Family member claimants also fall within the plain terms of the class. For all of these plaintiffs, the Settlement Agreement compromised their claims. By bringing new actions in state court, the plaintiffs seek to avoid the effect of the Settlement Agreement and the judgment issued by this court.

A federal court retains the power to enforce and to consider challenges to settlements entered into in cases originally filed with the court. *See Fox v. Consolidated Rail Corp.*, 739 F.2d 929, 932 (3d Cir. 1984), *cert. denied*, 469 U.S. 1190, 83 L.Ed.2d 966, 53 U.S.L.W. 3528 (1985); *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert. denied*, 425 U.S. 912, 47 L.Ed.2d 762, 96 S.Ct. 1508 (1976). If there is no independent basis for jurisdiction, absent some special need of the parties, the settlement must have been "incorporated into an order of the court," *Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299, 1303 (4th Cir.), *cert. denied*, 439 U.S. 1047, 58 L.Ed.2d 706, 99 S.Ct. 722 (1978), or there must have been a "deliberate retention of jurisdiction, as by issuing an injunction or by stating that jurisdiction is retained for a particular purpose." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1190 (7th Cir. 1985); *see United Steel Workers v. Libby, McNeil & Libby*, 895 F.2d 421, 423 (7th Cir. 1990); *cf. Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371, 190 U.S.P.Q. (BNA) 392 (6th Cir.) ("Even in those instances in which the court's original jurisdiction may have been questionable, it has jurisdiction over settlement agreements, the execution of which renders the prior controversy academic."), *cert. denied*, 429 U.S. 862, 50 L.Ed.2d 140, 97 S.Ct. 165, 191 U.S.P.Q. (BNA) 751 (1976).

By any standard this court has jurisdiction over both removed actions: a state suit will reduce the funds available to the class, providing a special need for exercise of federal jurisdiction; the settlement now sought to be circumvented by plaintiffs was embodied in a judgment of this court after full fairness hearings; and, since the class action is still pending in this court, jurisdiction was deliberately retained and is being exercised.

The practical effect of the new actions will be harmful to other class members. Any judgments in state court against the defendants will be paid from the indemnity fund. When parties to a federal action are being adversely affected, the court may not allow its judgment and orders to be flouted. *See Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974) (court has duty to enforce settlement it approved). This is especially true in class actions. "In a class action, the district court has a duty to see that any settlement it approves is completed, and not merely to approve a promise . . . ." *In re Corrugated Container Antitrust Litig.*, 752 F.2d 137, 141 (5th Cir.), *cert. denied*, 473 U.S. 911 (1985).

The Settlement Agreement was incorporated by the court in the decision upholding its fairness, subject to hearings on attorney fees and consideration of plans for distribution. 597 F.Supp. at 862. The Settlement Agreement was also approved "according to its terms" in the court's order and final judgment. 618 F.Supp. at 624-25. In its final order and judgment of dismissal, the court explicitly retained jurisdiction "for the limited purposes of maintaining, administering and distributing the Settlement Fund, pending its final disposition." 618 F.Supp. at 625. That continuing mandate was broadened when the Court of Appeals for the Second Circuit also directed the court to maintain jurisdiction over the Class Assistance Program and to supervise and manage the distribution of the entire Settlement Fund. 818 F.2d at 185-86.

The intimate involvement of the court with the administration of both the Payment Program and the Class

Assistance Program evidences the court's continuing jurisdiction over the class. On a daily basis, the court responds to inquiries of class members. When necessary, it assists them in obtaining compensation from the Settlement Fund. It continues to review the thousands of decisions of the Special Master of Appeals. Each grant developed by the Class Assistance Program is examined and must be approved by the court. Current scientific literature and legislative action are reviewed and made part of the court file. The number of entries on the case docket has grown from approximately 8,000 at the time of settlement to over 13,000 today. These activities are more than sufficient to support a finding that the court retained jurisdiction.

Since the court has retained jurisdiction over the class action it has authority to ensure that the Settlement Agreement it previously approved is enforced according to its terms. Under the circumstances, a new and independent basis for subject matter jurisdiction is not necessary for the court to rule on the merits of plaintiffs' claims. The claims are a challenge to the integrity of the Settlement Agreement and the authority of this court. This court has the power and the obligation to protect and effectuate its orders and final judgments in the *Agent Orange* litigation.

3. Court's Power to Enforce Its Injunction

As part of the Order and Final Judgment of Dismissal, the court enjoined all class members from commencing any action arising out of or related to exposure to Agent Orange. 618 F.Supp. at 624. The plaintiffs are all members of the class barred from instituting new actions against the settling defendants.

A federal court, as a court of equity, has the authority to enforce its injunction "with or without an explicit reservation of jurisdiction . . . ." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1183 (7th Cir. 1985). "The mandate of an injunction issued by a federal district court runs nationwide, and 'violation of an injunctive order is cognizable in the court which issued the injunction regardless of where the violation occurred.'" *Waffenschmidt v. Mackay*, 763 F.2d 711, 716 (5th Cir. 1985),

cert. denied, 474 U.S. 1056 (1986) (citation omitted) (quoting *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963)).

The fact that the judgment is not labeled an injunction is irrelevant. "The determination of whether an order is an injunction depends upon the substantial effect of the order rather than its terminology." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir. 1980), *cert. denied*, 459 U.S. 988 (1982). By barring "each and every plaintiff and member of the . . . class . . . from instituting or maintaining any action against any of the defendants," 618 F.Supp. at 624, the court effectively issued an injunction which bars the current actions.

The plaintiffs are all subject to the court's bar against instituting new actions against these defendants. Plaintiffs have violated the court's order by bringing a new action in another forum.

4. Federal Nature of Plaintiffs' Claims

The plaintiff is normally the master of its complaint, and a federal question will not be found if it is not in the complaint. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 53 L.Ed. 126, 29 S.Ct. 42 (1908). Nevertheless, this court must "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir.) (quoting 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3722, at 268-75), *cert. denied*, 479 U.S. 272, 93 L.Ed.2d 613, 55 U.S.L.W. 4077, 107 S.Ct. 683 (1986). An action relying on state law is essentially federal in nature where a plaintiff has had its rights determined by a federal court and the subsequent state action is an attempt to avoid the prior federal judgment. *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 397, 69 L.Ed.2d 103, 101 S.Ct. 2424 & n.2 (1981).

In *Moitie* plaintiffs brought a federal antitrust action and the claim was dismissed on the merits. Plaintiffs then used the same facts to assert a state law claim against the same defendants. The action was removed to federal court and dismissed on *res*

judicata grounds. While there was no federal claim apparent on the face of the complaint, the Supreme Court endorsed the lower courts' finding that the claim was considered "federal in nature" because it was merely an "artful pleading" to avoid the prior federal judgment. *Id.*

The Second Circuit Court of Appeals in clarifying *Moitie* has identified two criteria for determining when a state action will be considered federal in nature. First, the elements of the claim must be "virtually identical" to those in the prior federal action. *Sarkisian*, 794 F.2d at 760. Second, the plaintiff must have chosen the federal forum in the earlier litigation. *Id.* The second element is critical in rendering the state claim "federal" since it implies that "plaintiff's choice of a state forum is motivated by the desire to evade the consequences of prior federal litigation." *Bowlus v. Alexander & Alexander Servs. Inc.*, 659 F.Supp. 914, 918-19 (S.D.N.Y. 1987); *see Sarkisian*, 794 F.2d at 760.

Both of the *Sarkisian* criteria are present here. Plaintiffs are members of the *Agent Orange* class action. Although plaintiffs affirmatively disclaim reliance on federal law and assert state law as the sole basis for relief, these claims are identical to the claims raised by the class action complaint. The class plaintiffs chose the federal forum to manage the class action. These new plaintiffs cannot now "abuse the dual court system by filing in state court a second lawsuit . . . ." *Sarkisian*, 794 F.2d at 761.

Plaintiffs object to the application of *Sarkisian* for two reasons. First, they argue that the rule of that case controls only if the first federal court litigation is brought under federal question rather than diversity jurisdiction. Since the *Agent Orange* litigation was a diversity action, plaintiffs contend that it does not fall within the *Sarkisian* rule. While it is true that *Sarkisian* itself involved a prior federal question claim, there is no indication that the Court of Appeals intended to so limit its reach. Such a limit would be unjustifiable in light of the policy behind the *Sarkisian* doctrine of preventing "double-dipping." Surely it is a worse abuse to litigate *exactly* the same state law

claims twice than it is to litigate parallel, though perhaps not identical, federal and state law claims.

Second, the plaintiffs contend that they never "chose" to proceed in the earlier litigation in this court and therefore cannot be said to be seeking avoidance of the Settlement. Since plaintiffs allege that they did not gain definitive knowledge of their membership in the *Agent Orange* class until their injuries manifested after the 1984 opt-out deadline, they argue that, as individuals, they did not actively choose to proceed. But the concept of the class action is that it is a representative litigation. If plaintiffs did not choose to litigate, their class representatives chose on their behalf.

In short, the plaintiffs' current actions challenge the viability of Rule 23 of the Federal Rules of Civil Procedure and of class action settlements. If the plaintiffs, as class members, are allowed to undermine a settlement agreement and set aside a federal court's judgment through new state court suits, it is hard to imagine any future defendant in a federal court class action considering settlement since the agreement would always be open to attack by class members in state court.

Because plaintiffs' actions are in reality artful pleadings to avoid a prior federal court decision, this court has jurisdiction over plaintiffs' removed actions.

5. Court's Power to Order Removal

The All-Writs Act, 28 U.S.C. § 1651(a), authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985); *see In re Joint Eastern & Southern Dists. Asbestos Litig.*, 120 Bankr. 648, 656 (E. & S.D.N.Y. 1990); *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 134 F.R.D. 32, 37 (E & S.D.N.Y. 1990). The Act authorizes federal courts to exercise jurisdiction over persons "'who . . . are in a position to frustrate the implementation of a court order or the proper administration of justice.'" *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir.

1988) (emphasis omitted) (quoting *Benjamin v. Malcolm*, 803 F.2d 46, 53 (2d Cir. 1986)), *cert. denied*, 489 U.S. 1077 (1989). The Act even permits a federal court to remove state court actions to federal court in situations where specific statutory removal authority is absent. *City of Yonkers*, 858 F.2d at 863; *see United States v. New York Tel.*, 434 U.S. 159, 172, 54 L.Ed.2d 376, 98 S.Ct. 364 (1977).

By bringing new suits in state court, the plaintiffs challenge the binding effect of the Settlement Agreement and the order of this court prohibiting new suits by class members. The new suits are a direct threat to the continuing viability of the judgment settling the class action. The suits will also consume the $10 million set aside to indemnify the settling defendants and reduce the recovery of the remaining class members.

If the cases had remained in state court, the court would have had the authority to order their removal. Moreover, any rulings inconsistent with the prior federal order would have been subject to further injunction by this court. *See City of Yonkers*, 858 F.2d at 864 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974)). Taking jurisdiction of the cases after their voluntary removal is a "less drastic, and therefore preferable result." *City of Yonkers*, 858 F.2d at 864.

The removal of these actions to this court is a mechanism for protecting this court's judgment and order. Under the circumstances, it is the preferred method of enforcement, since it affords greater comity to state courts and is less burdensome on the parties than an injunction or contempt citation would be.

B. *Motion to Dismiss*

The terms of the Settlement Agreement, incorporated in this court's order, bar plaintiffs from proceeding with this action. That these plaintiffs' injuries were not discovered until after the initial opt-out deadline of May 1, 1984 is irrelevant. The Settlement Agreement expressly included "persons who have not yet manifested injury." 597 F.Supp. at 865. The agreement was approved by this court, upheld by the Second Circuit, and left

undisturbed by the Supreme Court. 618 F.Supp. at 624-25, *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Defendants' motion to dismiss is therefore granted with respect to all plaintiffs (other than the civilian plaintiffs).

Since the court has found that it has subject matter jurisdiction and has granted defendants' motion to dismiss, it need not decide defendants' motion to amend the notices of removal with regard to the plaintiffs who are class members. There has been, and continues to be, a court-ordered bar on suits by class members against the defendants; accordingly, the court also need not address defendants' motion for a permanent injunction.

V. EQUITY

At the heart of these lawsuits is plaintiffs' belief that it is unfair to bind them to the settlement because the latency of their injuries prevented them from knowing definitively whether or not they were included in the class at the time of the first deadline for opting out of the *Agent Orange* class action. The law allows them to be so bound. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 638-639 (2d Cir. 1988) (affirming reorganization plan that binds future claimants with no present injuries). They are in fact bound. 618 F.Supp. at 625, *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004. Nevertheless, plaintiffs' argument raises significant considerations of justice.

The courts and Congress have long recognized the utility of equity actions in which one party brings suit as the representative of a group of claimants. *See* 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1751, at 7 (2d ed. 1986). Such representative suits provide for, among other advantages, the filing of enforceable claims that would be economically infeasible for one party to pursue, the protection of all parties from inconsistent judgments, and the efficient administration of justice. *Id.* § 1754, at 54. Class actions are particularly valuable in mass torts where the transactional costs and burdens of individual litigation are great. *See In re Joint*

Eastern & Southern Dist. Asbestos Litig., 129 Bankr. 710, 803-39 (E. & S.D.N.Y. 1991); Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U.Ill.L.Rev. 269.

Nevertheless, a representative suit can work unfairness, particularly when the representation binds persons who only become aware that they are class members after settlement rather than persons who, at the time the action is brought and decided, can definitively determine whether they are in the class. One can imagine many genuine conflicts of interest between two such groups within a class action. *See In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 Bankr. at 771-73. 1991. For example, current litigants might be willing to achieve a settlement even if it leaves funds inadequate to compensate future victims. Alternatively, future claimants might, in retrospect, disagree with prior litigation strategy or find new evidence in support of their claims.

Although Federal Rule of Civil Procedure 23(a) and (b) sets out criteria designed to ensure that all class members are being properly represented, for Rule 23(b)(3) actions, the "best practicable notice" requirement of Rule 23(c) is intended to provide additional protection of "the interests of individuals in pursuing their own litigations." *See* Fed. R. Civ. P. 23(c)(2) *Advisory Committee's Note to 1966 Amendments*. Yet a plaintiff with a latent injury may even have actual notice and still not receive this additional protection because he or she may not have reason to believe the injury will appear.

Courts are authorized to take steps to alleviate these problems in the interest of fairness. As in the Manville bankruptcy actions, courts can oversee the appointment of a guardian to represent the interests of future claimants in class action litigations and settlements. *See In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 Bankr. at 773. Such a guardian was not necessary in the *Agent Orange* Settlement because of the way it was structured to cover future claimants. All of the courts which considered the *Agent Orange* Settlement were fully cognizant of the conflict arguments now hypothesized

by the plaintiffs and took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund.

In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment fund. The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.

Even when it is proper and necessary for the courts to be solicitous of the interests of future claimants, the courts cannot ignore the interests of presently injured plaintiffs as well as defendants in achieving a settlement. Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability. Making settlement of Rule 23 suits too difficult will work harms upon plaintiffs, defendants, the courts, and the general public.

No less than in 1978, when the first of the *Agent Orange* suits was brought, the predicament of the Vietnam veterans and their families is one that warrants national concern and action. The settlement of the *Agent Orange* litigation promised, and has provided, a partial remedy for many veterans' hardships. But the suffering of the veterans and their families, and the frustration and anger it causes, continues to argue for a more systematic and powerful cure. In 1984 this court urged that "the government join with plaintiffs and defendants in even greater efforts toward this noble goal." 597 F.Supp. at 862. Last year, an important step was taken by the Department of Veterans Affairs, which expanded care provided to Vietnam veterans by establishing an official "presumption" that, in certain circumstances, syndromes such as non-Hodgkin's lymphoma and chloracne resulted from service in Vietnam. 38 C.F.R. § 3.311a (1990). Congress has since codified and expanded this decision in a statute that also establishes a program for federally funded research into the connection between herbicide exposure and various diseases, to

be conducted in conjunction with the National Academy of Sciences. *See Agent Orange Act of 1991*, Pub. L. No. 102-4, 105 Stat. 11 (1991). Present and future claimants alleging exposure to Agent Orange thus may be eligible to receive compensation from both the *Agent Orange* settlement and the Department of Veteran Affairs.

By their actions, Congress and the Department of Veteran Affairs have recognized that the Agent Orange controversy has become a political rather than a judicial question. *See* 137 Cong. Rec. H719 *et. seq.* (January 29, 1991) (statements of members of Congress in support of the Agent Orange Act). Except for overseeing the expenditure of the Settlement Fund to ensure that it does the greatest possible good for the veterans and their families, the court can do nothing more for the plaintiffs.

VI. CONCLUSION

Decision on the plaintiffs' motion for remand as it affects the two civilian plaintiffs, Charles Brown and Clarence White, is reserved for further consideration. The motion for remand is denied as to all other plaintiffs. They are members of the class previously certified in the *Agent Orange* litigation. The claims of (or on behalf of) Shirley Ivy, Donald Ivy, Charles Jardon, Toni K. Jardon, Charles Jardon Jr., Robin Jardon, Warren Jardon, Sharon Jardon, Verda Wilson, Isaiah Wilson, Jr., Shirley Zalewaski, Yen Zalewaski, Gary Thomas, Mary Lee Thomas, James L. Kent, Emma I. Kent, Dawn Marie Inman, Bobby Joe Inman, Earl Thompson, Judy L. Thompson, James Donald Deloatch, Joyce Deloatch, Peggy Sands, Martin Sands, Emile Annibolli, Ursula Margot Parry, James D. Parry, Sr., James D. Parry, Jr., James Christopher Parry, Laura Jenkins, Eddie Jenkins, Ronald L. Hartman, Katherina H. Hartman, Jeffrey Alan Hartman, and Angela Hartman are dismissed.

No costs or disbursements are awarded. The court will not entertain a Rule 11 motion for sanctions. It has considered the issue and finds sanctions not warranted.

So ordered.

[APPENDICES TO OPINION OMITTED]

APPENDIX C

UNITED STATES DISTRICT COURT

For the Eastern District of New York

Nos. 79 Civ. 747, 89 Civ. 3361,
90 Civ. 3928, and MDL No. 381

MICHAEL F. RYAN, *et al.*,

Plaintiffs,

v.

DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, T H AGRICULTURE & NUTRITION COMPANY, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL INC., and THOMPSON CHEMICALS CORPORATION,

Defendants.

In re "AGENT ORANGE" Product Liability Litigation;

SHIRLEY IVY, *et al.*,

Plaintiffs,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Defendants.

RONALD L. HARTMAN, *et al.*,

Plaintiffs,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Defendants.

NOVEMBER 12, 1991

JUDGE: Jack B. Weinstein, United States District Judge

OPINION BY: WEINSTEIN

In the companion cases of *Ivy v. Diamond Shamrock Chemicals Co.*, 89 Civ. 3361, and *Hartman v. Diamond Shamrock Chemicals Co.*, 90 Civ. 3928, the claims of plaintiffs who fell within the class whose action was settled in 1984 were dismissed. *See In re "Agent Orange" Prod. Liab. Litig.*, MDL No. 381, F.Supp. (E.D.N.Y. October 4, 1991).

On October 24, 1991 the court granted a hearing on a motion brought by counsel for the *Ivy* plaintiffs requesting (1) that, under Federal Rule of Civil Procedure 59, the court reconsider its October 4, 1991 memorandum, and (2) that the court disqualify itself from further proceedings under 28 U.S.C. § 455(a) for lack of impartiality.

Plaintiffs' Rule 59 Motion

Plaintiffs' Rule 59 motion is granted only insofar as it corrects factual mistakes concerning the procedural history of the Ivy and Hartman actions which appeared in the court's memorandum and order of October 4. That memorandum will be amended accordingly.

The issues of law raised by plaintiffs' Rule 59 motion are fully dealt within the October memorandum and need not be re-addressed here.

Plaintiffs' Section 455(a) Motion

Plaintiffs' motion under 28 U.S.C. § 455(a) is denied. The crux of that complaint is that the court is biased in favor of protecting the fund created by the 1984 class action settlement. The use of the word bias in this sense is inappropriate. A court has a duty to enforce settlements that were properly approved. *See In re "Agent Orange" Prod. Liab. Litig.*, MDL No. 381, F.Supp. (E.D.N.Y. October 4, 1991).

A judge is not disqualified from hearing a case because he or she has had previous dealings with the litigation. Judges are

competent to rule on collateral attacks against their own decisions. *See, e.g., Savitz v. G. D.Searle & Co.*, 94 F.R.D. 669, 669 n.1 (E.D.N.Y. 1982). Disqualification is only appropriate "by virtue of some factor which creates partiality arising outside of the events which occur in the [litigation] itself." *In re International Business Machines Corp.*, 618 F.2d 923, 927 (2d Cir. 1980). Plaintiffs do not allege such a factor.

Plaintiffs' Rule 59 motion is granted only to the extent described above; in all other respects it is denied. Plaintiffs' motion under 28 U.S.C. § 455(a) is also denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 92-7575

SHIRLEY IVY, et al.,

Plaintiffs-Appellants,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, et al.,

Defendants-Appellees.

On Appeal from the United States District
Court For the Eastern District of New York

AUGUST 26, 1993

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellants Shirley Ivy, et al.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

APPENDIX E

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX F

AFFIDAVITS OF SHIRLEY IVY
(Pages 110-11 of Second Circuit Joint Appendix)

IN THE UNITED STATES DISTRICT COURT

SHIRLEY IVY, Individually and as Representative of the Estate of DONALD IVY, et al.	[]	CV-89-03361 (E.D.N.Y.)(JBW)
Plaintiffs,	[]	
VS.	[]	[B-89-00559-CA (E.D.TEX.)]
DIAMOND SHAMROCK CHEMICALS COMPANY, et al.	[]	
Defendants.	[]	

AFFIDAVIT OF SHIRLEY IVY

SHIRLEY IVY, of Rt. 1, Huntington, Texas, 72949, being duly sworn testifies as follows:

1. I am named Plaintiff in the above captioned suit claiming damages from defendant chemical companies for injuries and death sustained as a proximate result of the exposure of Donald Ivy to dioxin and other chemicals found in Agent Orange (the "claims").

2. The foregoing death and injuries for which claims have been made in this action occurred or were manifested only after May 7, 1984.

3. Neither I nor Donald Ivy have ever actually agreed to settle our claims.

4. Neither I nor Donald Ivy received formal or informal notice of the existence of a class action lawsuit possibly involving our claims before May 8, 1984.

5. Neither I nor Donald Ivy received formal or informal notice of the right to "opt out" of a class action lawsuit possibly involving our claims before May 8, 1984.

6. Neither I nor Donald Ivy received formal or informal notice of the settlement of a class action lawsuit involving Agent Orange before exploring our legal recourse in 1988.

7. Neither I nor Donald Ivy have ever made any request for, nor received any payments from, funds provided pursuant to the settlement of a class action lawsuit involving Agent Orange.

8. Neither I nor Donald Ivy have ever actually authorized any attorney to enter into an agreement to settle our claims.

9. No party or attorney who may have purported to settle our claims for their "nuisance value" as part of a 1984 class action settlement of a group of Agent Orange claims did, or could have, provided adequate representation to Donald Ivy or me in presenting our claims.

10. My sole attorney in this matter is Robert M. Hager. He is not authorized to accept any service of process on my behalf, or any service except in the above-captioned lawsuit.

The foregoing affidavit is a true and accurate statement of my testimony.

Shirley Ivy
(signature)

Signed and sworn before me by Shirley Ivy this
22 day of February, 1991.

My commission expires on the 15 day of January 1993.

SIGNED: Janet S. LaSalle
(signature)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SHIRLEY IVY, Individually and as Representative of the Estate of DONALD IVY, et al.	[]	CV-89-03361 (E.D.N.Y.)(JBW)
Plaintiffs,	[]	
VS.	[]	[B-89-00559-CA (E.D.TEX.)]
DIAMOND SHAMROCK CHEMICALS COMPANY, et al.	[]	
Defendants	[]	

AFFIDAVIT OF SHIRLEY IVY

SHIRLEY IVY, of Rt. 1, Huntington, Texas, 72949, being duly sworn testifies as follows:

1. Neither I nor my late husband Donald Ivy or any of our children have ever lived in the state of New York.

2. Neither I nor any of our children and so far as to my knowledge Donald Ivy have ever been to the state of New York.

3. Neither I nor my late husband Donald Ivy or any of our children have ever conducted business in the state of New York.

4. Neither I nor my late husband Donald Ivy or any of our children have any contacts whatsoever in the state of New York.

5. All of us are from the state of Texas and have lived in and around Huntington all of our life.

Shirley Ivy
(signature)

Signed and sworn before me by Shirley Ivy this
27 day of February, 1991.

My commission expires on the 15 day of January 1993.

SIGNED: Janet S. LaSalle
(signature)